88-500

No.

Supreme Court, U.S.
FILED
SEP 21 1988
JOSEPH F. SPANIOL, JR.
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In The

Supreme Court of the United States

October Term, 1988

ILLINOIS COMMERCE COMMISSION, *et al.*,
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES E. WEGING
Special Assistant Attorney General
Illinois Commerce Commission
180 North LaSalle Street, Room 810
Chicago, Illinois 60601

GORDON P. MacDOUGALL
1025 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 223-9738

Attorneys for Petitioners

September 1988

CASILLAS PRESS, INC. – 1717 K STREET NW WASHINGTON DC 20036 – 223-1220

QUESTIONS PRESENTED

1. Whether the court below properly sustained the I.C.C.'s rules governing carrier exemption from abandonment statutes for so-called "out of service" rail lines.

2. Whether the court below properly sustained the I.C.C.'s elimination of the System Diagram Map requirements of 49 U.S.C. 10904 for "out of service" lines.

3. Whether the court below properly determined that abnandonment of "out of service" lines would have little to do with a carrier's incentives in ratemaking, and that rail rates outside a market-dominance setting are presumed reasonable and lawful.

LIST OF PARTIES

The following parties appeared in the proceedings before the Court of Appeals below:

Illinois Commerce Commission
Patrick W. Simmons
Commissioner of Transportation of the
State of New York
Association of American Railroads
Rails to Trails Conservancy
Iowa Trails Council
Conservation Federation of Maryland
Interstate Commerce Commission
United States of America

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vs.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Illinois Commerce Commission, and Patrick W. Simmons (Illinois Legislative Director for United Transportation Union), respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this proceeding.

OPINIONS BELOW

The opinion of the court of appeals (App. B, 2a-41a), is reported at 848 F.2d 1246 (D.C. Cir. 1988).

The opinion of the court of appeals in the predecessor case, styled *Illinois Commerce Com'n* v. *I.C.C.*, 787 F.2d 616 (D.C.Cir. 1986), is reprinted herein. (App. D. 44a-82a).

The decisions of the Interstate Commerce Commission ("ICC") in its Ex Parte No. 274 (Sub-Nos. 8 & 8A), are reprinted herein and are reported as *Exemption of Out of Service Rail Lines*, 366 I.C.C. 885 (App. E, 83a-93a), 1 I.C.C. 2d 55 (App. F, 94a-98a), and 2 I.C.C. 2d 146 (App. G, 99a-113a).

JURISDICTION

The opinion of the court of appeals, by a divided two-to-one vote (App. B. 2a-41a), was entered and amended May 24, 1988. The judgment (App. C, 42a-43a) was entered May 24, 1988.

The time within which to file a petition for a writ of certiorari was extended to and including September 21, 1988, by order of the Chief Justice dated August 15, 1988. (App. A, 1a).[1]

The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1). See also 28 U.S.C. 2101(c) and 2350(a).

STATUTES INVOLVED

Pertinent provisions of the Interstate Commerce Act, 49 U.S.C. 10101a, 10505, and 10904, are set forth herein. (Appendix H, 114a-118a).

STATEMENT OF THE CASE

1. The ICC's power to regulate the proposed abandonment or discontinuance of all rail service over a line of railroad, or

[1]A second request for a 30-day extension, for the full 60-day period provided by 28 U.S.C. 2101(c), was denied September 12, 1988 by the Chief Justice.

a portion of a line of railroad, stems from Transportation Act of 1920, which added 49 U.S.C. 1(18)-(20) to the Interstate Commerce Act, recodified and amended to its present 49 U.S.C. 10903-4. *Colorado* v. *United States,* 271 U.S. 153 (1926). Notice of the proposed abandonment and a copy of the application are required to be filed with the Governor or chief executive officer of each State in which any portion of the line is situated. 49 U.S.C. 1(19), recodified to its present 49 U.S.C. 10904(a)(3)(A). In 1976, Congress added the System Diagram Map (SDM) requirement, so that if an abandonment is opposed by a significant user of the line, or by a State or political subdivision, the ICC may issue an abandonment certificate only if the carrier has given at least four months advance notice of the application, by listing the line on its SDM as a candidate for abandonment. 90 Stat. 128-29. 49 U.S.C. 1a(5) (1976), recodified to 49 U.S.C. 10904(e)(3). The addition of the SDM requirement, with the four months notice proviso, was done at a time Congress also enacted financial assistance procedures for the acquisition or subsidy of railroad lines. 90 Stat. 129-30. 49 U.S.C. 1a(6)-(10) (1976), recodified to 49 U.S.C. 10905 (1978).

2. Congress in the same 1976 legislation, known as the Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 31, enacted a provision whereby the ICC could exempt transactions, on an indiviudal or class basis, if by reason of limited scope, regulation is not necessary to effectuate the national transportation policy and would be an undue burden and would serve little or no useful purpose. 90 Stat. 41. 49 U.S.C. 12(1)(b) (1976), recodified to 49 U.S.C. 10505 (1978).

3. Congress in Staggers Rail Act of 1980, revised the financial assistance procedures for lines approved by the ICC for abandonment, so as to require a "forced sale" by an abandoning rail carrier. 94 Stat. 1942-45. 49 U.S.C. 10905 (1980).

See: Hayfield N.R. Co. v. *Chicago & N.W. Tr. Co.*, 467 U.S. 622 (1984). The Staggers Act also broadened the ICC's exemption power, so that the agency could exempt a transaction, or class of transactions, if it found (1) regulation is not necessary to carry out the rail transportation policy (49 U.S.C. 10101a), and (2) either the transaction is limited in scope, or regulation is not needed to protect shippers from the abuse of market power. 94 Stat. 1913. 49 U.S.C. 10905 (1980). Congress in the Staggers Act set forth a separate *rail* transportation policy, 49 U.S.C. 10101a, in addition to the preexisting *national* transportation policy which, as amended, now governs other modes of transportation. 94 Stat. 1897-8. 49 U.S.C. 10101.[2]

Also in the Staggers Act, Congress completed amendments initiated in the 1976 legislation with respect to railroad ratemaking. The longstanding requirement that all rates be "reasonable" was eliminated.[3] 94 Stat. 1898-1900. 49 U.S.C. 10701a (1980). Instead, the ICC is to determine whether, under 49 U.S.C. 10709, a rail carrier has market dominance over the transportation to which a particular rate applies. Market dominance means an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies. 49 U.S.C. 10709(a). The I.C.C. has issued regulations to govern market dominance since the 1980 amendments. *See: Market Dominance Determinations*, 365 I.C.C. 118 (1981); *Product and Geographic Competition*, 2 I.C.C. 2d 1 (1985). If a rail carrier has "market dominance," then the ICC has jurisdiction to inquire into the reasonablenss of the rate. Of course, the existence of market dominance does

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[2]The rail transportation policy embraces 15 criteria. 49 U.S.C. 10101a. (App. H, 114a-115a).

[3]The Congress did retain the requirement that a rate cannot be below minimum reasonableness. 49 U.S.C. 10701a(c).

not establish a presumption that a rate exceeds maximum reasonableness. 49 U.S.C. 10709 (d)(4).

4. This controversy involves the interplay between the ICC's regulation of abandonments and financial assistance procedures, on the one hand, and the ICC's power to accord a class exemption from such regulation, on the other, and if the statutory requirements have been met. The ICC in early 1982, proposed to give rail carriers an automatic exemption from the abandonment and financial assistance requirements of 49 U.S.C. 10903-5, with respect to any line which has been "out of service" for two or more years. 47 F.R. 13538. (March 31, 1982). The ICC received 44 comments in response to its deregulation proposal, with the non-railroad parties generally in opposition. *Exemption of Out of Service Rail Lines*, 366 I.C.C. 885, 894. (App. E, 83a, 92a).

The ICC concluded in June, 1983, to grant the class exemption from 49 U.S.C. 10903-5 for a line segment, if "out of service" for at least two years, and if no formal complaint had been filed or was pending with the ICC or decided in favor of the complainant with the two-year period. To use the exemption, the railroad would file a notice with the ICC at least 50 days before the abandonment consummation date, and would give notice to the State regulatory commission 10 days prior to filing its notice with the ICC. *Exempiton of Out of Service Rail Lines*, 366 I.C.C. at 889, 893. (App. E, 87a, 91a)

5. The ICC's definition of an "out of service" line segment is not that of common understanding, but is a term of art. The ICC's considers a line "out of service" if no "local" traffic moved over the line for at least two years, and that the overhead traffic handled on the line can be rerouted over other lines. By "local" traffic, the ICC means that no business originated or terminated on the track segment; however, trains

could move over the segment with business not originating or terminating on the segment (''overhead'' traffic), and yet the line portion would still be classified ''out of service.'' 366 I.C.C. at 887-88. (App. E, 85a-86a).

This bizzare definition of ''out of service'' was a major factor in the first reviewing court's assessment of the ICC's findings. 787 F.2d at 620 n.3, 623 n.32, 634-35. (App. D, 46a n.3, 51a n.32, 76a-79a).

An example of the class exemption employed to break a 40.9-mile single line into two segments by a 4.0-mile ''out of service'' middle segment abandonment was the railroad line between Champaign and Clinton, IL. The trains operated between Clinton and Champaign but there were no stations on a middle 4.0-mile portion of the line. CF. *Illinois Commerce Com'n* v. *I.C.C.*, 789 F.2d 951, 952 n.1 (D.C. Cir. 1986).

6. These petitioners, along with the Commissioner of Transportation for State of New York, sought review of the ICC's ''out of service'' class exemption in the court of appeals. Meanwhile, the ICC extended the exemption to include lines over which service would be discontinued, rather than the line abandoned. *Exemption of Out of Service Lines*, 1 I.C.C. 2d 55. (App. F, 94a-88a).

The court of appeals vacated the ICC's class exemption, and remanded. *Illinois Commerce Com'n* v. *I.C.C.*, 787 F.2d 616 (D.C. Cir. 1986). (App. D, 44a-82a).[4] The court found many of the ICC's findings to be unsupported. In particular, the court focused on criteria specified in the rail transportation policy, such as (1) energy conservation, (2) rate reasonableness, (3) national defense, and (4) cooperation with

[4]Later, the court of appeals also vacated the ICC's class exemption for discontinuance of service. 2 I.C.C. 2d 146 n.3. (App. G, 99a, n.3). 848 F.2d at 1248 n.1 (App. B, 5a n.1).

States. 787 F.2d at 625-32. (App. D, 57a-71a). The ICC's definition of "out of service" also was held to result in unsupported findings for the "limited scope" and "market abuse" under 49 U.S.C. 10505(a). 787 F.2d at 634-35. (App. D, 76a-79a). Finally, the court requested clarification of railroad employee protection. 787 F.2d at 635-35. (App. D, 79a-81a).

7. On remand, the ICC did not reopen its proceeding for further comments or evidence, despite the considerable passage of time. Instead, in late 1986, the ICC simply issued a further decision, giving additional reasons in support of the exemption. 2 I.C.C. 2d 146. (App. G, 99a-113a). The ICC's decision was by a sharply divided 3-to-2 vote, Commissioners Simmons and Lamboley dissenting. 2 I.C.C. 2d at 158-59. (App. G, 111a-12a).

8. These petitioners, New York's Commissioner of Transportation, and various Rails-to-Trails groups, sought judicial review of the ICC's remand decision. This time the court of appeals, by an entirely different panel, affirmed the ICC's "out of service" class exemption, in a *per curiam* opinion. 848 F.2d 1246. (App. B, 2a-41a). Judge Mikva dissented with respect to the criterion of the rail transportation policy, 49 U.S.C. 10101a(9), dealing with ICC cooperation with States. 848 F. 2d at 1261-65. (App. B, 34a-41a).

The majority held that the legislative history of the Staggers Rail Act of 1980 "clearly evinces Congress' desire to deregulate the railroads." 848 F.2d at 1248 n.2. (App. B, 5a n.2). Starting from that premise, the opinion reached conclusions directly opposite from those by the first panel. Two subjects in the opinion are of particular importance. The first is the rail transportation policy's criterion for the ICC to cooperate with the States, 49 U.S.C. 10101a(9), and the second is the rate reasonableness criteria, 49 U.S.C. 10101a(1)

and (6), in particular, but also 10101a(3), (10), (11), and (13). 848 F.2d at 1251 n.7. (App. B, 10a n.7).

The majority affirmed the ICC's exemption to railroads from compliance with the SDM requirements, i.e., that States be given four months advance notice prior to a carrier's filing an abandonment request with the ICC, 49 U.S.C. 10904(e)(3), for the same reasons asserted by the ICC, principally that no shippers would lose service by abandonment of an "out of service" line segment. 848 F.2d at 1253-54. (App. B, 14a-17a). 2 I.C.C. 2d at 152-55. (App. G, 105a-108a). Judge Mikva, dissenting, pointed to Congress' belief that the four-month period is needed for States, and that the States have considerable responsibilities in railroad abandonment, planning, and financial assistance. 848 F.2d at 1261-65. (App. B, 34a-40a).

With respect to rate reasonableness, the majority held that all freight rates outside a market-dominance setting are presumed to be reasonable (and thus lawful). Accordingly, the exemption was found not to affect rate reasonableness, on the theory the ICC is without power to alter lawful rate increses where the rail carrier does not possess market dominance. 848 F.2d at 1251-52. (App. B, 9a-12a).

REASONS FOR GRANTING THE WRIT

The questions presented for review are important. The ruling by the court of appeals that the ICC properly voided the notice period provided by Congress for States, is an important matter of federal law which should be settled by this Court. The ruling by the court of appeals that all rates outside a market-dominance setting are presumed reasonable, so that the rate reasonableness criteria of the rail transportation policy do not come into play, is in conflict with the statute and decisions by other courts of appeals.

I. CONGRESS BY THE STAGGERS ACT DID NOT INTEND TO DEREGULATE THE RAILROAD INDUSTRY.

Contrary to the theme underlying the majority's opinion, Congress did not by the Staggers Act intend to deregulate the railroads. The majority relies heavily upon language from the Conference Report. 848 F.2d at 1248-49 n.2. (App. B, 5a n.2). However, the Conference Report was qualified, and even where the ICC grants an exemption, subsequent ICC oversight was mentioned. *(Ibid.)*.[5]

The ICC still regulates the railroads. The ICC remains in business. Many line abandonments are subject to full regulation. *Georgia Public Service Com'n* v. *United States*, 704 F.2d 538 (11th Cir. 1983); *Black* v. *I.C.C.*, 737 F.2d 643 (7th Cir. 1984). Where market dominance is first demonstrated, the ICC thereafter passes upon the reasonableness of rail rates. *Salt River Project Agr. Imp.* v. *United States*, 762 F.2d 1053, 1055, 1058 n.5, 1065 (D.C. Cir. 1985); *Western Coal Traffic League* v. *United States*, 719 F.2d 772, 776 (5th Cir.183) (en banc). The ICC regulates rail carrier consolidations, and recently denied the proposed affiliation between the Santa Fe and Southern Pacific railroads. *Santa Fe Southern Pacific Corp.-Control-SPT Co.*, 2 I.C.C. 2d 709 (1986) and 3 I.C.C. 2d 926 (1987).

Moreover, the *Coal Exporters* decision relied upon by the majority for its sweeping deregulation holding, 848 F.2d at 1248-49 n.2 (App. B, 5a n.2), is to the contrary, for it recognized the Staggers Act was a compromise. *Coal Exporters Ass'n*

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[5]It appears the language of the Conference Report upon which the court of appeals relies was never available to the Committee members, but instead was a staff 'legislative intent,'' and never reviewed. *See:* Eckhardt, Robert C., *Western Coal Traffic League Case*, 13 Transp. L.J. 307, 316-17 (1984).

of U.S. v. *United States*, 745 F.2d 76, 81 (D.C. Cir. 1984), *cert. den.*, 471 U.S. 1072:

> "The Staggers Act was not, however, a simple deregulation of the railroad industry . . . The legislation . . . was subject to significant modification during floor debate . . . The resulting Act was a compromise that enjoyed overwhelming support."

The Congress did not intend to deregulate the railroad industry in 1980, when it expanded the scope of 49 U.S.C. 10505, first enacted in 1976.

II. THE MAJORITY IN DENYING STATUTORY ABANDONMENT NOTICE TO STATES, DID NOT ACCOMMODATE THE CLASS EXEMPTION TO CONGRESSIONAL PROGRAMS WHICH INVOLVE STATE RESPONSIBILITIES.

The majority acted contrary to Congressional directives and State responsibilities in sustaining the ICC's exemption of rail carriers from the System Diagram Map (SDM) notification requirements. The statute requires four months advance notice be given to States prior to filing an abandonment application. 49 U.S.C. 10904(e)(3)(B). When an abandonment application is filed, and if protested, the abandonment cannot be consummated for an additional 90 to 120 days, and perhaps longer if an investigation is instituted. 49 U.S.C. 10904(c). However, the ICC in exempting the railroads from the SDM requirements, would afford States only 60 days notice prior to actual abandonment consummation.

The dissent by Judge Mikva points to the role assigned by Congress to the States in rail abandonment, planning, and financial assistance legislation. States may be involved in the purchase or subsidy of a line proposed for abandonment, or in the feeder railroad development program. Likewise, States

are involved in the interim trail use program, and other "public use" for abandoned rail lines. Moreover, States are involved in the Local Rail Service Assistance Program. 848 F.2d at 1262-3. (App. B, 34a-37a).

The majority made no attempt to accommodate the role of the States in the various federal programs, with the "out of service" class exemption. Yet Congress has placed large responsibilities upon the States with respect to the preservation and maintenance of rail service. The principal justification advanced by the ICC for eliminating the statutory notice period is the asserted "nonuse" of such "out of service" lines. 2 I.C.C. 2d at 153-4. (App. G, 106a-107a) But such "nonuse" is fictitious, for as indicated by the dissent, rail lines qualify for exempt abandonment as "out of service" include lines that are currently carrying rail traffic but do not contain local shippers who originate or receive shipments. 848 F.2d at 1264. (App. B, 38a):

> "Thus, a rail segment that bears overhead traffic in the middle of a longer line that does service local shippers is fully eligible for the abandonment exemption — a fact somewhat obscured by the Commission's description of eligible lines and lines experiencing 'nonuse.' "

The notion that States should be required to scrutinize active lines to determine where there are segments generating no local traffic and whose overhead traffic could be rerouted is "patently ludicrous." 848 F.2d at 1264. (App. B, 38a).

The opinion below has passed upon an important matter of federal-state relationships, where Congess has prescribed a satutory notice period for States, but a federal agency has voided that notice on a bogus concept of "out of service" rail lines.

III. THE COURT OF APPEALS DEFINED RATE REASONABLENESS IN A MANNER IN CONFLICT WITH THE STATUTE AND DECISIONS BY OTHER COURTS.

The abandonment of a railroad line can alter the competitive situation for shippers. This is especially true where the involved line segment constitutes the shortest distance for rail ratemaking purposes, and this is so irrespective of whether the line handles only overhead traffic, or is "out of service" under any definition. The ICC will consider the effect of an abandonment on short-line rate-making in passing upon the merits of an abandonment application, and may even imposed a condition to the abandonment in this regard. Cf. *Southern Pac. Co. Abandonment*, 317 I.C.C. 489, 497-98 (1962); *Chicago, M., St. P. & P.R. Co. Trustee Abandonment*, 217 I.C.C. 361, 365 (1936); *Mississippi Public Service Commission* v. *I.C.C.*, 650 F.2d 551, 553 n.4 (5th Cir. 1981).

The holding by the court of appeals that the exemption will have little if anything to do with a carrier's incentive to continue offering a particular rate is not based upon knowledge of the railroad world — and is demonstrably incorrect. 848 F.2d at 1251. (App. B, 11a). Carriers operating more distant routes compete with other carriers offering rates over shorter routes. Abandonment of a so-called "out of service" line which is the ratemaking line has an obvious impact upon carrier incentives.

The rail transportation policy looks to competition to establish reasonable rates. 49 U.S.C. 10101a:

> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail.

The court of appeals stated that increased rates stemming from an abandonment would not be unreasonable, because unless a carrier has market dominance, all rates are presumed reasonable and lawful. 848 F.2d at 1251-52. (App. B, 9a-12a). The court of appeals ruled that a rate in the absence of market dominance could not be unreasonable, and contested our position that a rate can be unreasonable, yet lawful. *(Ibid.)*.

The court of appeals is wrong in according any presumption of reasonableness dependent upon whether market dominance does or does not exist. Clearly, the ICC's finding of market dominance does not establish a presumption that the rate exceeds maximum reasonableness. 49 U.S.C. 10709(c). So too, the reverse proposition. Market dominance is entirely separate from reasonableness. *General Chemical Corp.* v. *U.S.*, 817 F.2d 844, 847 (D.C. Cir. 1987):

> "This separation of market dominance determination from assessments of rate reasonableness reflects Congress' conscious rejection of perfect competition as the governing norm in railroad regulation. . . . . The isolation of the market dominance inquiry thus is central to Congress' plan of structured deregulation in the rail industry."

The court of appeals for the 1st Circuit recognized that "market dominance" is a different concept from "reasonableness," so that a reasonable rate cannot be presumed from an absence of market dominance. *New England Power Co.* v. *United States*, 693 F.2d 239, 240 (1st Cir. 1982):

> "Prior to the . . . Reform Act, all rail rates were subject to regulation by the Commission under the "just and reasonable" standard. The Reform Act, taking a major step towards deregulation of rail rates, required the Commission, before applying the just and reasonable standard, to find that the carrier

> whose rates were challenged had "market dominance" over the services to which the rate applied."

See also: Salt River and *Western Coal Traffic League, supra,* p.9.

The court of appeals acted contrary to the statutory provisions of 49 U.S.C 10701a in holding that rates published in a non market-dominance situation are presumed reasonable. Congress made no such presumption. A rate can be unreasonable, yet lawful. Competition is to be relied upon to maintain reasonable rates -- not regulation. 49 U.S.C. 10101a(1). The reduction in competition when rate-making lines are abandoned is inconsistent with the goal of competitive and reasonable rates.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals in this case.

Respectfully submitted,

JAMES E. WEGING
Special Assistant Attorney General
Illinois Commerce Commission
180 North LaSalle Street, Room 810
Chicago, Illinois 60601

GORDON P. MacDOUGALL
1025 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 223-9738

Attorneys for Petitioners

September 21, 1988

APPENDIX A

SUPREME COURT OF THE UNITED STATES

No. A88-123

Illinois Commerce Commission, et al.,
Applicants

v.

Interstate Commerce Commission, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including September 21, 1988.

/s/ William H. Rehnquist
Chief Justice of the United States

Dated this 15th
day of August, 1988

APPENDIX B

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1687

ILLINOIS COMMERCE COMMISSION and
PATRICK W. SIMMONS, PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

ASSOCIATION OF AMERICAN RAILROADS,
RAILS TO TRAILS CONSERVANCY, and
IOWA TRAILS COUNCIL, INTERVENORS

No. 87-1015

COMMISSIONER OF TRANSPORTATION OF THE
STATE OF NEW YORK, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 87-1278

RAILS TO TRAILS CONSERVANCY,
IOWA TRAILS COUNCIL, and
CONSERVATION FEDERATION OF MARYLAND, PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

Petitions for Review of Orders of the
Interstate Commerce Commission

Argued February 25, 1988

Decided May 24, 1988

Gordon P. MacDougall, with whom *James E. Weging*, Special Assistant Attorney General, were on the brief for petitioners Illinois Commerce Commission and Patrick W. Simmons in No. 87-1687.

William J. Dwyer for petitioner Commissioner of Transportation of the State of New York in No. 87-1015.

Charles H. Montange for petitioners Rail to Trails Conservancy, Iowa Trails Council, and Conservation Federation of Maryland in No. 87-1278.

Louis Mackall, Attorney, ICC, with whom *Robert S. Burke*, General Counsel, *Ellen D. Hanson*, Associate General Counsel, *Anne S. Almy*, Assistant Chief, Land and Natural Resources Division, Department of Justice, and *J. Carol Williams*, attorney, Department of Justice, were

on the joint brief for Respondents the ICC and the United States.

John T. Sullivan and *J. Thomas Tidd* were on the brief for intervenor, Association of American Railroads.

Before: MIKVA, STARR, and SILBERMAN, *Circuit Judges.*

Opinion for the Court *Per Curiam.*

Opinion concurring in part and dissenting in part filed by *Circuit Judge* MIKVA.

PER CURIAM: This case is before us a second time following a remand to the Interstate Commerce Commission. The controversy relates to the ICC's relaxation of regulatory strictures triggered by a railroad's proposed abandonment of rail lines that have fallen into a state of rail-traffic desuetude. In our prior consideration, we concluded that the ICC's order establishing a class exemption for abandonments was, in certain respects, deficient under the applicable standards of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982). Specifically, we concluded that in three particulars the Commission failed adequately either to address salient points adumbrated in comments submitted to the ICC or to marshall the requisite factual support for the conclusions undergirding the Commission's final rule.

The question now before us is whether the ICC complied on remand with both the APA's strictures and the specific requirements previously articulated by this court. In addition, an entirely new set of questions arose during the course of the proceedings on remand, namely, whether the ICC's actions comply with various federal environmental statutes. For the reasons that follow, we uphold the Commission's decision.

I

The order in question involves an expedited method of effecting abandonment of "out of service" rail lines,[1] which are defined as those carrying no local traffic for at least two years. The Commission promulgated the regulation, 49 C.F.R. § 1152.50 (1985), pursuant to the deregulatory mandate of the Staggers Rail Act of 1980,[2] specifically section 10505. 49 U.S.C. § 10505 (1982). Section 10505 requires the ICC to exempt a transaction or class of transactions from regulation when the Commission finds that (1) regulation is not necessary to carry out the multi-faceted national rail transportation policy (RTP), as set forth in 49 U.S.C. § 10101a; and (2) either (a) the transaction is of limited scope, or

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[1] The exemption also extends to discontinuances of service and trackage rights under 49 U.S.C. § 10903-05 (1982). *Exemption of Out of Service Rail Lines*, 2 I.C.C.2d 146 (1986).

[2] The legislative history of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980), clearly evinces Congress' desire to deregulate the railroads. In enacting section 10505 and conferring broad exemption authority on the ICC, Congress expected that "as many as possible of the Commission's restrictions on changes in prices and services by rail carriers will be removed [through the use of section 10505] and that the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power." H.R. Rep. No. 1430, 96th Cong., 2d Sess. 105, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4110, 4137. Congress believed that "the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress." *Id.*; *see also Illinois Commerce Comm'n v. ICC*, 749 F.2d 875, 885 (D.C. Cir. 1984) (deregulation through exemption process overriding purpose of Act), *cert. denied*, 474 U.S. 820 (1985); *Coal Exporters Ass'n v. United States*, 745 F.2d 76, 82 (D.C. Cir. 1984) (exemption provision intended to give ICC very broad authority to eliminate unnecessary regulation), *cert. denied*, 471 U.S. 1072 (1985).

(b) regulation is not needed to protect shippers from the abuse of market power. *Id.* § 10505(a). The statutory and procedural background of the rulemaking is thoroughly chronicled in our previous opinion, the upshot of which was to dispatch the rulemaking back to the Commission for further consideration and explanation. *Illinois Commerce Comm'n v. ICC*, 787 F.2d 616 (D.C. Cir. 1986).

In directing a remand, our colleagues faulted the Commission's order in several respects. First, the ICC had failed adequately to consider whether the abandonment regulations from which it was exempting eligible rail lines were necessary to effectuate relevant goals of the RTP, specifically: (1) energy conservation, (2) maintenance of reasonable rates, (3) meeting the needs of the national defense, and (4) cooperation with States in respect of transportation matters. *Id.* at 629-32.[3] Second, the Commission had neglected to assess the adequacy of its findings concerning the limited scope of the exemption and the potential for abuse of market power, in light of the expanded definition of "out of service" adopted in the final rule. *Id.* at 634-35. The originally proposed definition of "out of service," which encompassed only rail lines carrying no traffic at all for at least two years, had been expanded in the final rule to include lines carrying overhead traffic, *i.e.*, traffic that neither originates nor terminates on a line and can be rerouted over other lines. *Id.* at 634. Finally, the original regulation had specified no clear procedure for challenging the sufficiency of employee protections automatically provided under the exemption. *Id.* at 636.

On remand, the ICC readopted the class exemption for "out of service" lines, but elaborated on the points found

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[3] For the reader's reference, the multi-pronged RTP is quoted in full at footnote 67 in our prior opinion. *Illinois Commerce Comm'n*, 787 F.2d at 626 n.67.

wanting in our prior opinion. *Exemption of Out of Service Rail Lines*, 2 I.C.C.2d 146 (1986). Unenamored of this result, the Illinois Commerce Commission and Patrick Simmons (Illinois) filed a petition with the ICC requesting a stay of the decision's effective date pending appeal. Expanding the already broad horizons of the proceeding, Rails to Trails Conservancy (RTC), joined by two other nonprofit organizations,[4] entered the fray for the first time by petitioning the ICC for reconsideration and a stay of its decision. Ex Parte No. 274 (Sub-No. 8) *Exemption of Out of Service Rail Lines*, (not printed) decided June 15, 1987. RTC argued, first, that the rulemaking constituted a major federal action triggering the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (1982), with which the Commission had failed to comply; second, that the exemption requirements failed to assure compliance with a number of applicable environmental statutes, including NEPA and the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f (1982); and, finally, that the ICC failed adequately to consider the effect of the regulations on public use of abandoned lines under the National Trails System Act, 16 U.S.C. § 1247 (1982), and the public use provision of the Interstate Commerce Act, 49 U.S.C. § 10906 (1982). *Id.* The Commission denied all the petitions, and these petitions for review followed.[5]

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[4] Iowa Trails Council and Conservation Federation of Maryland joined RTC in the agency proceedings and now on review.

[5] Separate petitions for review were filed by the Illinois Commerce Commission and Patrick Simmons; the Commissioner of Transportation of the State of New York; and Rails to Trails Conservancy, Iowa Trails Council, and Conservation Federation of Maryland. The petitions were consolidated by the court.

II

A

In our earlier decision, the first area of concern articulated by our colleagues related to the ICC's treatment of the RTP or, more specifically, the agency's examination of the five RTP goals listed above. *See* 49 U.S.C. § 10505 (a) (1). Now, after reviewing the agency's analysis on remand of each of these five factors, we are persuaded that the Commission's conclusion (that application of the abandonment regulations to "out of service" lines is not necessary to carry out the RTP) is neither arbitrary nor capricious; to the contrary, the Commission's analysis is reasonable and adequately supported by the record. *Cf. Illinois Commerce Comm'n v. ICC*, 819 F.2d 311, 317 (D.C. Cir. 1987) (applying "arbitrary and capricious" standard to trackage rights agreements); *Brae Corp. v. ICC*, 740 F.2d 1023, 1038 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1069 (1985) ("arbitrary and capricious" review of exemption of boxcar freight rates from regulation).

In our prior consideration of this case, the court faulted the agency's finding that exemption would promote energy conservation, 49 U.S.C. § 10101a(15), as being "utterly lacking in record support." *Illinois Commerce Comm'n*, 787 F.2d at 629. On remand, the agency modified this particular determination, concluding "upon further reflection . . . that energy conservation is unlikely to be affected in any significant way." *Out of Service*, 2 I.C.C.2d at 148. In arriving at this latter, more modest conclusion, the Commission reasoned as follows: where a line has carried no traffic at all, abandonment will have no effect on energy consumption since there is no traffic to be cut off or diverted to other routes or modes of transportation. Although abandonment of a line that has carried overhead traffic may result in some increase (or decrease) in fuel consumption due to rerout-

ing, any such change, the ICC reasoned, should be insignificant since it is in the carrier's interest to maintain the most efficient routes and to aggregate traffic in order to minimize energy costs. *Id.*

Illinois attempts to derail this line of reasoning by arguing that even if carriers operate efficiently, they will nonetheless reroute traffic in ways that save costs elsewhere in their operations, but not necessarily in a manner that conserves energy. Brief for Illinois at 13. Illinois further contends that rerouting traffic may involve much more than a minimal increase in fuel consumption. *Id.* Illinois cites nothing, however, in support of either of these speculative assertions. Nor do petitioners point to anything indicating that application of the abandonment regulations is, as the statute contemplates, *necessary* to the promotion and encouragement of energy conservation. In contrast to petitioners' creative exercise in the realm of the hypothetical, the ICC's analysis logically and persuasively explains why the agency believes the effect on energy matters will be *de minimis*;[6] in the absence of an indication that the agency's judgment is flawed, we are persuaded that the explanation is amply reasoned to pass muster under the APA.

B

The second RTP-related concern which had been inadequately addressed in the ICC's earlier decision involved the effect of the class exemption on rate reasonableness. In the court's view, the ICC had failed to con-

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[6] In its decision, the Commission observed that in situations where overhead traffic is not being rerouted efficiently (which presumably would include cases where rerouting has resulted in more than a *de minimis* increase in energy consumption), an affected shipper may file a petition for reconsideration challenging the carrier's representation that all overhead traffic can be rerouted in an efficient manner. *Out of Service*, 2 I.C.C.2d at 151.

sider whether abandonment of "out of service" lines will expose shippers to excessive rates in circumstances where there is a want of competition. *Illinois Commerce Comm'n*, 787 F.2d at 630.[7]

Upon reexamination of this point, the Commission concluded that the class exemption will not affect the agency's ability to assure the reasonableness of rates. *Out of Service*, 2 I.C.C.2d at 148. In so concluding, the ICC observed that exemption will not in any way alter the Commission's authority to regulate rates nor will it provide carriers with an opportunity to initiate previously forbidden rate actions. With or without an exemption for abandonments of "out of service" lines, the ICC emphasized, carriers are at liberty to set rates at levels of their choosing, subject to protest by shippers. *Id.* at 149.[8] Nothing in the exemption works a change to this carefully crafted scheme.

Illinois attacks the Commission's finding as to rate reasonableness on several fronts, only two of which merit discussion. Illinois contends, first, that the exemption

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[7] In discussing rate reasonableness, the court focused on subsection 6 of the RTP, which directs the ICC "to maintain reasonable rates where there is an absence of effective competition. . . ." 49 U.S.C. § 10101a(6). In its petition for review, Illinois points to several other RTP factors which relate to rate reasonableness, including sections 10101a(1), (3), (4), (10), (11), and (13). Brief for Illinois at 14.

[8] Section 10701a provides that "unless a rate is prohibited by a provision of this title, a rail carrier . . . may establish any rate for transportation or other service provided by the carrier." 49 U.S.C. § 10701a(a). Carriers establish rates for particular lines in tariffs, which they are required to file and maintain. Tariffs are subject to protest (for changed rates) and complaint (for existing rates) procedures. Rates established by carriers with market dominance are subject to challenge on the ground that they exceed a maximum reasonable level. *Id.* § 10709. Where there is competition, no such challenge is permitted since competition serves to assure the reasonableness of rates.

will have an adverse effect on rates because the abandoned lines would no longer be available for constructing more favorable rates in what is known as "short line ratemaking." Brief for Illinois at 15.[9] But this argument, on reflection, largely ignores the process by which rates are established. "Short line ratemaking" is completely voluntary; carriers may terminate the use of a particular "short line" rate at any time, regardless of whether the line has been abandoned and, if it has been abandoned, regardless of whether abandonment was effected pursuant to the statutory or exemption abandonment procedures. Conversely, carriers may maintain a favorable rate, based on an abandoned line, simply by filing a tariff to that effect. *Out of Service*, 2 I.C.C.2d at 149. In short, the abbreviated abandonment procedures have little if anything to do with a carrier's ability, obligation, or incentive to continue offering a particular rate.

Next, Illinois questions the ICC's reliance on its authority to regulate rates as sufficient to prevent carriers' imposing unreasonable rates following on the heels of an abandonment, asserting that a rate can be "unreasonable" yet lawful and thus beyond the ICC's rate-regulatory reach. Brief for Illinois at 17-19. Illinois cites no authority for this proposition, however.[10] This

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[9] "Short line ratemaking" is a practice employed by some carriers to allow shippers to take advantage of a lower rate that applies over a route other than the actual route of movement. *Out of Service*, 2 I.C.C.2d at 149 n.7.

[10] Illinois does cite two cases in support of its assertion that rates can be unreasonable, yet lawful and beyond the ICC's power to regulate. Brief for Illinois at 19 n.22. Neither decision, however, stands for this proposition. Rather, they establish that the ICC may not find a rate unreasonable unless it has established market dominance. *Atchison, T. & S.F. Ry. v. ICC*, 580 F.2d 623, 627 (D.C. Cir. 1978); *Potomac Elec. Power Co. v. United States*, 584 F.2d 1058, 1066 (D.C. Cir. 1978).

should come as no surprise. The ICC is empowered to regulate any unreasonable rate charged by a carrier with market dominance. 49 U.S.C. § 10709. In the absence of such dominance, however, the statute assumes that competition in the marketplace will, as it were, "regulate" rates; all rates outside a market-dominant setting are presumed to be reasonable (and thus lawful). The ICC is without power, either with or without the exemption for "out of service" lines, to alter lawful rate increases.

In sum, Illinois' attempts to demonstrate that the statutory abandonment procedures are necessary to ensure rate reasonableness are unavailing. The Commission's determination that the exemption does not affect the rate reasonableness policies of section 10101a, undergirded as it is by a reasoned explanation, readily withstands APA scrutiny.

C

In our previous decision, the court condemned the agency's treatment of a third RTP goal, namely developing a sound rail transportation system to meet the needs of the national defense, 49 U.S.C. § 10101a(4), as inadequate by virtue of the Commission's failure to respond to comments submitted by the Department of Defense. *Illinois Commerce Comm'n*, 787 F.2d at 630-31. Illinois asserts that the Commission on remand once again failed to do its job in this respect. Brief for Illinois at 29-30. The two main points flagged by DOD in its comments back in 1982 were, first, that advance notice of abandonments is essential to safeguard the national defense and, second, that the financial assistance procedures available in the statutory abandonment provisions (designed to provide for the rescue of about-to-be-abandoned lines) should be made available under the exemption. *Illinois Commerce Comm'n*, 787 F.2d at 630 n.102.[11] Both con-

[11] The financial assistance procedures, 49 U.S.C. § 10905, permit DOD (or any other interested party) either to purchase the line or subsidize its operations as a means of avoiding abandonment or discontinuance.

cerns, we are satisfied, received adequate consideration on remand.

For one thing, the ICC effectively mooted DOD's earlier comments on the financial assistance program since the agency promulgated rules specifically providing for application of those provisions in exemption cases. *See* Ex Parte No. 274 (Sub-No. 16) *Exemption of Rail Line Abandonments or Discontinuance—Offers of Financial Assistance*, decided Dec. 14, 1987. As to DOD's concern over the adequacy of impending abandoments, the Commission observed that, in a separate proceeding,[12] it had in fact extended the period for notice provided to the Defense Department. *Out of Service*, 2 I.C.C. at 151. Railroads invoking the class exemption are now required to notify DOD in writing at least ten days prior to the filing of a notice of exemption with the ICC, thereby according the Department at least sixty days' notice before the abandonment's effective date. 49 C.F.R. § 1152.50 (d). The Commission determined that, although this provides less notice than DOD had originally requested,[13]

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[12] *Exemption of Out of Service Rail Lines—Notice to the Department of Defense*, 1 I.C.C.2d 323 (1985).

[13] In its comments, DOD had suggested that adequate notice would be provided by identification of targeted lines on a carrier's System Diagram Map for at least four months prior to abandonment, as required under the statutory abandonment procedures. *Illinois Commerce Comm'n*, 787 F.2d at 630 n.102. Under the statute, railroads are required to maintain complete diagrams of their transportation systems and must indicate lines projected for abandonment or potentially subject to abandonment. 49 U.S.C. § 10904 (e) (2). When an abandonment is opposed by a State (or political subdivision) or a significant user of the line during the previous twelve months, a certificate of abandonment ordinarily will not issue unless the line was described in the diagram or an amendment to the diagram at least four months prior to the application. *Id.* § 10904 (e) (3). The ICC's failure to incorporate this requirement into the exemption procedures is addressed more fully in the text which follows.

the sixty-day period should afford ample time to identify lines that should be preserved by virtue of national defense considerations.

Illinois' sole criticism of this analysis is that "[t]he System Diagram Map requirement . . . is the critical notice period." Brief for Illinois at 30. The System Diagram Map, which is part of the statutory abandonment scheme, provides interested parties with four months' notice of potential or proposed abandonments. *See supra* note 13. Illinois neglects to explain why this four-month period, while obviously helpful, is critical or why, if additional time is necessary to meet the Nation's defense needs, DOD failed to reiterate its concern by petitioning for review. Although additional notice would presumably be helpful from DOD's standpoint, Illinois provides us with nothing to indicate that additional time beyond the sixty-day period is in any way *necessary* to DOD's evaluation of proposed abandonments. In the absence of evidence to the contrary, we are satisfied as to the reasonableness of the agency's determination that sixty days' notice is adequate.

D

A related issue which was remanded for further consideration involved the RTP goal of cooperation with the States in transportation matters, 49 U.S.C. § 10101a(9). *Illinois Commerce Comm'n*, 787 F.2d at 631. In our previous decision, the court faulted the ICC's failure to consider comments submitted by States protesting the lack of notice of proposed abandonments under the class exemption. *Id.*[14] Basically, the States contended that re-

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[14] The court also criticized the Commission's failure to maintain the financial assistance procedures as requested by the States. *Illinois Commerce Comm'n*, 787 F.2d at 631. As noted in our discussion of national defense needs, the ICC has since promulgated rules making the requested procedures auto-

tention of the System Diagram Map, or its equivalent, is necessary both to the States' rail planning efforts and to provide notice to rail users who might oppose the abandonment. *Id.* Illinois and New York continue to press that point before us. Brief for Illinois at 30-31; Brief for New York at 7-8. On remand, the Commission considered and rejected these contentions, providing a thorough and well-reasoned explanation for doing so. We turn, then, to the Commission's explanation.

Although rejecting the argument that the statutory abandonment procedures, specifically System Diagram Maps, are necessary to further the goals of the RTP, the Commission squarely responded to the position that notice should be afforded prior to consummation of an abandonment. Under the exemption procedures, States receive notice at least sixty days before the exemption is effective and an abandonment can occur. 49 C.F.R. § 1152.50(d). In justifying the adequacy of the sixty-day period, the Commission observed that the exemption, which by definition applies solely to lines that have generated no traffic for at least two years and carry only overhead traffic that can be rerouted (and thus readily accommodated), results in no loss of service to shippers. *Out of Service*, 2 I.C.C.2d at 154-55. Furthermore, the transactions encompassed by the exemption tend to be noncontroversial, as evidenced by the small number of abandonments generating opposition under the exemption (only 10 of the first 200 cases). *See id.* at 150. In light of this factual predicate, the Commission concluded that the benefits of the additional notice accruing to the small number of States and shippers affected by abandonments of out-of-service lines are outweighed by the costs

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matically available in exemption proceedings, thereby fully satisfying the States' concern. *See* Ex Parte No. 274 (Sub-No. 16) *Exemption of Rail Line Abandonments or Discontinuance—Offers of Financial Assistance*, decided Dec. 14, 1987.

to railroads both in maintaining the Maps and in delaying desired abandonments for four months. *Id.* at 154.

The ICC's reliance on the sufficiency of the sixty-day notice period did not rest on this balancing alone, however. The Commission considered the situations of various parties who might potentially be affected or involved in rail planning and explained why the notice provided by the System Diagram Maps is unnecessary to protect the interests of such groups. For example, if, in spite of the absence of local traffic, a particular line is important to the State's rail system, the State should monitor its activity, as lack of use will tend to herald eventual abandonment. *Id.* at 153-54. Similarly, a shipper dependent on a particular line but who (somehow) fails to use the line for two years can likewise be expected, in reason, to shoulder the burden of monitoring material developments under such rather unusual circumstances; a shipper of that sort cannot reasonably presume an indefinite continuation of service on a manifestly marginal line. *Id.* at 154. Finally, a new business that wishes to employ the affected line can reasonably be expected to inquire into the line's future, with the railroad presumably having no reason to be less than forthright about any plans to abandon the track. *Id.*

In the absence of indications that additional notice is necessary to promote cooperation with the States, the Commission's classic line-drawing choice of sixty days' notice appears reasonable.[15] We are further persuaded

[15] In his partial dissent, our colleague quite rightly emphasizes the role of the States in carrying on the implementation of a sound and efficient rail transportation system. With that role we have not the slightest quarrel. Consonant with our historic system of federalism fashioned at the Founding, Congress has ordained a vital, complementary role for the States in the rebuilding and maintenance of the Nation's rail transportation system. That being said, our disagreement rests entirely on a narrow but important point, namely whether it is for this court to tear asunder the carefully

that the Commission's determination, predicated as it is on the agency's experience, is entirely in keeping with the deregulatory thrust of the Staggers Act.

III

We turn to the next major area of concern articulated in our prior visitation to this case, namely the ICC's treatment of section 10505's second prerequisite to exemption. To recap, in order to qualify for an exemption, section 10505 requires *either* that the transaction be of limited scope, *or* that application of the statutory provision be unnecessary to protect shippers from the abuse of market power. 49 U.S.C. § 10505(a)(2) (emphasis added). In its original decision, the Commission failed to examine whether its findings on these points were valid in light of the expanded definition of "out of service" contained in the final rule. *Illinois Commerce Comm'n*, 787 F.2d at 634-35. On remand, the ICC reaffirmed its conclusions, finding that the exemption, as expanded, was limited in scope and that regulation was unnecessary to protect shippers from market power abuses. *Out of Service*, 2 I.C.C. at 156.

Illinois challenges both determinations, arguing that the exemption, as expanded, is not limited in scope and that regulation is necessary to protect shippers. Brief for Illinois at 20-29; Brief for New York at 8. We need not plumb the depths of the first point, however, inasmuch

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crafted scheme erected by the Commission in vindicating the various (and at times competing) elements of the rail transportation policy. Fundamental values of federalism informing the statutory scheme are, we are satsified, secured by the system which the ICC has erected. True, the States are no longer afforded the four-months' notice provided by the Systerm Diagram Map mechanism. But the ICC focused specifically on the question of notice and deemed, for reasons we think sufficient to pass judicial muster, the notice mechanism under the new regime ample to vindicate those values. That being so, we are not at liberty to undo what the Commission has done in this particular.

as we are satisfied that the agency acted properly under the "abuse of market power" clause. *See Illinois Commerce Comm'n v. ICC*, 819 F.2d at 314 (requirements of section 10505(a)(2) are disjunctive; as long as the ICC properly determined that regulation is unnecessary to protect shippers from abuse of market power, it need not find the exempt transaction to be limited in scope).

The Commission provides a reasonable explanation for its conclusion that regulation of abandonments is unnecessary to prevent the abuse of market power. Essentially, the ICC relies on the proposition that a carrier's market power is unaffected by an abandonment. *Out of Service*, 2 I.C.C.2d at 156. The carrier's market power is determined not by the presence or absence of particular lines, but by the existence (or lack) of transportation alternatives available to shippers. Obviously, a carrier does not compete with itself, with one routing option vying with another for the greater share of traffic. If a carrier lacks market power prior to abandonment, then the carrier's decreasing the number of available routes on its own lines will do nothing to create power that did not otherwise exist. That is to say, after the abandonment, the carrier will be subject to the same competitive forces as previously. Conversely, if a carrier possess market power prior to an abandonment, reducing its routing options will neither augment nor diminish that power. *Id.* Although, as Illinois elaborately explains, abandonments may obviously alter a carrier's operations, *see* Brief for Illinois at 21-24, such alterations do not bear on the extent of competition (either from other rail carriers or from other modes of transportation) to which the carrier is subject.

Somewhat more specifically, the challengers emphasize the effect of abandonments on shippers located adjacent to the abandoned line. Illinois and New York hypothesize that railroads will employ the exemption as a device to sever important lines providing service to overhead ship-

pers. *Id.* at 31-33; Brief for New York at 6-8. According to this gloomy view, when a line is severed, shippers located on the segments adjacent to the abandoned section will suffer from the exercise of the carrier's increased market power. *Id.* Although Illinois cites a specific instance of abandonment within its borders as an example of this phenomenon, the State fails to explain how, if at all, the abandonment led to an abuse of market power. The sole evidence adduced by Illinois is a difference in rates charged to shippers on the two segments of line that were severed by the abandonment. Brief for Illinois at 33. For starters, however, Illinois does not explain how the rate differential constituted an abuse of market power.[16] Nor does Illinois demonstrate how the abandonment enabled the carrier to charge the differential; presumably, for reasons previously set forth, the carrier could have increased the rate charged the shippers on both segments of the line prior to the abandonment. *See Illinois Commerce Comm'n v. ICC*, 819 F.2d at 314-15 (although the acquisition of trackage rights under a class exemption may enable carriers to alter routes or raise rates on old routes under threat of abandonment, such behavior is not an "abuse of market power," but rather reflects the economics of the marketplace.)[17]

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[16] We note that if a rate differential is imposed in a discriminatory fashion, an affected party can seek a remedy under 49 U.S.C. § 10741(b).

[17] In response to the abandonment cited by Illinois as an example of market power abuse, the ICC refers to the agency's unchallenged findings in that case, namely that the line involved carried little overhead traffic and, thus, any effect on overhead traffic (and, presumably, any potential for abuse of market power) would be *de minimis*. Brief for Respondents at 30-31. The Commission further observed that in the rare situation where an exempt transaction results in market power abuse, affected shippers may challenge the abandonment in *post hoc* proceedings. *Id.* at 31 (citing *Illinois Commerce Comm'n*, 819 F.2d at 315 & n.3).

Thus, the rationale informing the Commission's "market power" determination appears sound; indeed, on remand the agency has more than adequately covered its tracks. In the absence of concrete evidence to the contrary, we are satisfied that the ICC's treatment of the "abuse of market power" factor was neither arbitrary nor capricious.

IV

The final issue remanded to the ICC involved the protection of railroad employee interests. Section 10505(g) prohibits the Commission from exercising its exemption authority to relieve a carrier of its obligation to protect employee interests. 49 U.S.C. § 10505(g). Pursuant to this mandate, the ICC ordered the standard labor protections, adopted by the agency in *Oregon Short Line R.R. —Abandonment—Goshen (OSL)*, 360 I.C.C. 91 (1979), applicable to carriers seeking to abandon lines under the auspices of the Commission-fashioned exemption. Observing that the *OSL* protections constituted only the requisite minimum, the court faulted the ICC for failing to clarify the appropriate procedures for seeking enhanced labor protection conditions. *Illinois Commerce Comm'n*, 787 F.2d at 636.

Responding to the court's directive, the Commission on remand established that the appropriate procedure by which labor organizations may seek higher levels of employee protection is a petition for partial revocation. *Out of Service*, 2 I.C.C.2d at 157. In the wake of the Commission's ameliorative action, the attack on this point is now waged all alone by Simmons,[18] who claims (for the second time) that protective conditions in abandonment proceedings must be implemented prior to consummation.[19] Simmons contends that *OSL* requires pres-

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[18] Neither Illinois nor New York joins Simmons in challenging the Commission's treatment of this issue.

[19] In their prior appeal, Illinois and Simmons asserted that "relegation of the issue of adequacy of employee protections

ervation of the *status quo* until the necessary labor protections are embodied in an agreement. Brief for Illinois at 34-35. Simmons claims that reconsideration rather than revocation should have been the procedural vehicle embraced by the ICC. *Id.* at 35 n.35.

Although the Commission's discussion fails expressly to address Simmons' point, we nevertheless find nothing arbitrary or capricious in its action. Undoubtedly, we would have been edified by the agency's views as to the proper interpretation of *OSL*. But in view of our express rejection of Simmons' argument the last time around, *see supra* note 19, we cannot fault the Commission for failing to set forth its views in this particular. *See Illinois Commerce Comm'n*, 787 F.2d at 636 n.157. As the old saying goes, enough is enough. What is more (than enough), the ICC provided a sensible explanation for its determination that post-abandonment revocation constitutes an adequate procedure to safeguard employee interests. The Commission pointed to the extremely limited number of abandonment cases under the statutory procedures in which labor interests had established a case of protections going beyond the *OSL* conditions. *Out of Service*, 2 I.C.C.2d at 157.[20] The ICC further predicted that the labor-related effects of abandonment of "out of service" lines would be minimal, since few employees would

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to post-abandonment revocation procedures would violate an administrative rule that the Commission must establish the level of employee protection before consummation of an abandonment." *Illinois Commerce Comm'n*, 787 F.2d at 636 n.157. The court expressly rejected the argument, stating that the case cited by petitioners for the proposition did not in fact support it. Undaunted by this adverse determination, Simmons continues to press the point.

[20] This should not be surprising, in view of the generous package of protections embodied in the *OSL* package, including in some cases full pay for up to six years for employees laid off by virtue of the abandonment. *See OSL*, 360 I.C.C. at 98-103.

likely be serving lines that had generated no local traffic for over two years. *Id.* Moreover, to the extent that the *OSL* conditions may prove inadequate, the Commission's procedures expressly permit, as we have just seen, those conditions to be augmented as circumstances warrant. *Id.*

Simmons says nothing that undermines the agency's reasoning, nor does he indicate how the legitimate interests of employees are prejudiced by consideration of protection issues *post* abandonment (again, in view of the panoply of remedies afforded by the standard *OSL* conditions). In light of (1) the small number of cases in which labor protection conditions would likely require augmentation, (2) the limited universe of railroad employees involved, and (3) the absence of any showing of prejudice to labor interests, it was reasonable for the Commission to conclude that pre-consummation consideration of labor protection issues beyond the OSL conditions is unnecessary to protect employees' interests.

V.

Having determined that the Commission has adequately addressed the concerns expressed in our previous opinion, we proceed to consider the arguments raised by Rails to Trails Conservancy ("RTC") in its appeal from the Commission's denial of RTC's petition for reconsideration.[21] RTC argues, first, that inadequate consideration was given to environmental consequences during the rulemaking itself, in violation of section 102 of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (1982). In its order denying reconsideration, the ICC

[21] Petitioner Rails to Trails Conservancy is joined by Iowa Trails Council and Conservation Federation of Maryland. These petitioners are public interest corporations devoted to minimizing adverse environmental impacts flowing from rail abandonments and to fostering public use, including public recreational trail use and rail banking, of railroad rights-of-way scheduled for abandonment.

rejected this contention, in part because the rulemaking would not result in more or less abandonments being granted, but instead would simply reduce regulatory burdens on abandonments that would occur in any event, and hence could have no environmental impact. The ICC's reasoning here is unsatisfactory, for it is not at all apparent that a change in procedure alone will not affect the environment—the new procedure may, for example, lessen the opportunity for environmental groups to influence the agency's final decision. The procedural nature of a regulation does not, therefore, exempt an agency from complying with NEPA and preparing an environmental assessment ("EA") or an environmental impact statement ("EIS") where appropriate.[22]

Contrary to RTC's suggestion, however, we do not believe the Commission did, in fact, ignore environmental factors when it promulgated this regulation. In its first rulemaking (prior to remand), the Commission noted that track removal and dispositions of rights-of-way could affect the environment and correctly stated that its exemption authority did not extend to exempting transactions from relevant environmental laws. Thus the Commission required parties seeking exemptions to submit evidence on environmental issues. 49 C.F.R. § 1152.50 (d) (4) (1985). The Commission also cautioned that individual exemption authorizations "may at times be conditioned upon compliance with environmental conditions." *Exemption of Out of Service Rail Lines*, 366 I.C.C. 885, 890 (1983); *Illinois Commerce Comm'n*, 787 F.2d at 629 n.89. Furthermore, subsequent to the rulemaking, in response to concerns raised by its own staff, the Council on Environmental Quality ("CEQ"), and RTC, the Commission has engrafted onto the abandonment regulations additional procedures to ensure com-

[22] An environmental assessment serves to aid an agency's compliance with NEPA when no environmental impact statement is necessary. 40 C.F.R. § 1508.9 (1987).

pliance with NEPA and other environmental statutes at the individual abandonment stage.

It is true, nevertheless, that the Commission was obligated by its own regulations and those of CEQ to prepare at least an EA prior to promulgating this regulation. But because the Commission did not ignore environmental consequences during the rulemaking, and subsequently has developed procedures to focus on those consequences when individual abandonments are authorized, we decline to remand. An order to the Commission to prepare an EA or an EIS and engage in rulemaking for a third time would be a meaningless gesture, not necessary to guarantee that the Commission will consider environmental concerns when it authorizes abandonments. *See Kerner v. Celebrezze*, 340 F.2d 736, 740 (2d Cir. 1965) (Friendly, J.) (remand for procedural error not necessary where it would accomplish nothing "save further expense and delay").

We turn next to RTC's contention that the actual procedures established by the regulation will result in the violation of NEPA each time the Commission authorizes an exemption. Under the regulation as promulgated, a carrier seeking an exemption must file a notice with the appropriate state Public Service Agency ten days prior to filing with the Commission. The carrier's application to the Commission itself must address environmental issues, and must be submitted fifty days before the date of abandonment. Within twenty days after receiving the application, the Commission publishes notice of abandonment in the Federal Register, and the exemption is effective thirty days later without any further Commission action. Under the regulation as originally promulgated, petitions to stay the exemption had to be filed within ten days of publication of notice in the Federal Register, and petitions to reconsider within twenty days. Those deadlines have since been modified by the Commission, as will be discussed below.

RTC attacks this regulation on grounds that it impermissibly shifts to private parties the burden of raising environmental concerns, that it allows the Commission to authorize an abandonment without considering the effect of that action on the environment, that it sets such a high burden on an applicant for a stay or reconsideration that abandonments will go forward despite submission of valid objections, and that the short notification period does not provide a reasonable opportunity for public participation.

RTC raises several powerful points, and if the regulation had not been modified at all in response to environmental concerns, the appropriate disposition of RTC's petition would be a remand to the Commission. Nevertheless, a remand is no longer necessary, for in several subsequent orders the Commission has addressed RTC's concerns by adding additional procedures and clarifying the burden that intervenors must meet to stay an abandonment proceeding. These subsequent orders, in addition to representations by counsel for the Commission at oral argument, persuade us that the current procedural regime for authorizing abandonments is not facially inconsistent with NEPA and other environmental statutes. Nothing we decide here, however, affects the rights of these petitioners or any others to challenge the adequacy of the Commission's procedures as applied to a particular abandonment.

We agree with RTC that, under the regulation as originally promulgated, the Commission's reliance on private parties to raise environmental concerns was unlawful. The Commission may not delegate to parties and intervenors its own responsibility to independently investigate and assess the environmental impact of the proposal before it. *Harlem Valley Transp. Ass'n v. Stafford*, 500 F.2d 328, 336 (2d Cir. 1974); *see also Steamboaters v. FERC*, 759 F.2d 1382, 1394 (9th Cir. 1985); *Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy*

Comm'n, 449 F.2d 1109, 1118-19 (D.C. Cir. 1971). In December 1987, however, the Commission instructed its Section of Energy and Environment to complete and make available to the public an environmental assessment within five days of publication of the exemption notice in the Federal Register.[23] At oral argument, counsel for the Commission represented that this EA would be the product of independent staff investigation and evaluation of the abandonment proposal—not a *pro forma* reworking of the applicant's assertions regarding environmental impact.

RTC questions whether an adequate EA can possibly be prepared in the time allotted. We review the Commission's judgment that its procedure satisfy NEPA for abuse of discretion. *See Vermont Yankee Nuclear Power Corp. v. Nat'l Resources Defense Council*, 435 U.S. 519, 554 (1978); *Kleppe v. Sierra Club*, 427 U.S. 390, 412-14 (1976). While the time for preparation of an EA is abbreviated, particularly if the proposed abandonment is extensive, *see Scientists' Inst. for Pub. Information, Inc. v. Atomic Energy Comm'n.*, 481 F.2d 1079, 1092

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[23] The Commission's notice states:

> In consultation between Commission staff and the Council on Environmental Quality, an issue has arisen concerning the timing of Environmental Assessments (EAs) in abandonments under this exemption. To assure adequate notice and opportunity for the public to comment on these documents, we are instructing our Office of Transportation Analysis (OTA), which includes the Section of Energy and Environment (SEE), to assure that EAs are completed and available within 5 days of publication of the notice of exemption in the Federal Register (FR). The fact that EAs will be available at that time upon request will be noted in each FR notice and SEE will continue to serve the parties and every agency with whom it has consulted in preparation of the document.

Ex Parte No. 274 (Sub-No. 8) *Exemption of Out of Service Rail Lines* (not printed), served Dec. 29, 1987.

(D.C. Cir. 1973) (NEPA statements will vary in length and complexity in relation to size of project being considered), we cannot say, in the context of this facial challenge, that the Commission has acted arbitrarily. Furthermore, if an abandonment application does present complex environmental problems, the Commission may on it own motion stay the exemption to allow an adequate EA or EIS to be prepared by its staff.

RTC also contends the EA comes too late in the authorization process to be meaningful. Council on Environmental Quality regulations require that "NEPA procedures must insure that environmental information is available to public officials and citizens *before decisions are made and before actions are taken.*" 40 C.F.R. 1500.1(b) (emphasis added). RTC asserts that the publication of notice of abandonment in the Federal Register is the relevant agency action or decision, and argues that the EA must therefore be prepared prior to publication, and not five days later, as provided by current procedures.

We think this argument is overly technical—an order to the Commission to prepare the EA five days earlier so as to coincide with publication of notice would exalt form over substance. The decision at issue here—that a particular abandonment is not subject to regulation—is not made at the moment notice is published in the Federal Register. While it is true, as RTC notes, that the exemption may become effective thirty days after publication without further action by the Commission, publication is nevertheless not the final step. The Commission's staff continues to investigate and assess environmental issues after publication, and if the staff or any intervenors raise questions suggesting the exemption should not be granted, the Commission will stay authorization while it considers such issues. Hence, publication of notice prior to completion of the EA does not conflict with NEPA, for it does not diminish the Commission's

capacity to take environmental concerns into account in its decisionmaking. No "irretrievable commitments" of agency or private resources occur upon publication, nor are options precluded or positions finally determined. *See Scientists' Institute*, 481 F.2d at 1094. Rather, the notice serves to alert interested parties about the abandonment and provides information on how to obtain the EA and request a stay or reconsideration. Of course, since publication of notice is not itself the final decision, the Commission, or some responsible official delegated authority by the Commission, must formally consider staff recommendations contained in the EA and comments by intervenors at some time prior to the effective date of abandonment. Moreover, the record of the abandonment authorization must clearly reflect this, in order to withstand subsequent judicial review. *See id.* at 1094-95. It must reflect, as well, an affirmative determination that the agency's environmental analysis permits the rail abandonment to go forward. Otherwise, a substantive decision may be made—the granting of the exemption—without the agency ever taking a hard look at environmental factors. As this court has held, "NEPA was intended to ensure that decisions about federal actions would be made only after responsible decision-makers had fully adverted to the environmental consequences of the actions, and had decided that the public benefits flowing from the actions outweighed their environmental costs." *Jones v. District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 512 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 937 (1975).

RTC correctly asserts that after an exemption is finally authorized and the railroad begins to tear up the track and dispose of the right-of-way, alternatives are clearly foreclosed and it would be too late at that point for the Commission to consider environmental factors. And yet, RTC argues, if the Commission declines to grant a stay at the request of an intervenor who raises environmental

concerns, because the intervenor has failed to make the required showing of probability of success and irreparable injury, the abandonment process will go forward even though the Commission may not have responded to serious questions presented it. Thus, according to RTC, a short notice period and a high threshold for granting a stay conspire to prevent the full consideration of environmental issues demanded by NEPA *before* major federal action is taken.

The Commission has responded to RTC's concern by informing this court in its brief and at oral argument that the Commission's current practice is to "stay any individual abandonment of an out-of-service line if environmental issues are raised and cannot be resolved through a Commission decision before the exemption would otherwise become effective for that line." Brief for the ICC and the United States at 40; *see also* ICC Docket No. AB-32 (Sub.-No. 36X), *Boston & Maine Corporation and Springfield Terminal Railway Company—Abandonment and Discontinuance of Service* (not printed), served Nov. 25, 1987. At oral argument, counsel for the Commission stated that no showing of irreparable harm or probability of success is required of intervenors or parties who raise environmental concerns—a stay will automatically be granted until the concerns are resolved by the Commission. As this procedure obviates the possibility that an abandonment would be authorized even though environmental questions were still outstanding, a remand is not necessary.

The importance of an EA or an EIS lies not merely in the aid it may give to the agency's own decisionmaking process, but also in the notice it gives the public of both the environmental issues the agency is aware of and those it has missed. The EA or EIS should provide a springboard for public comment, bringing to the agency viewpoints and options it might otherwise lack. *See Calvert Cliffs' Coordinating Comm.*, 449 F.2d at 1114; 40

C.F.R. § 1501.2(d)(2). RTC contends that the procedures set forth on the abandonment regulation fail to provide a reasonable period of time for meaningful public comment. A railroad seeking an abandonment exemption must notify the state public service commission ten days prior to filing the exemption provision. The Commission states that public interest groups such as RTC could establish a relationship with the public service commission in their locality and so receive early notification that an exemption will be requested. No EA would be available at that time, though, and so the usefulness of such notice to environmental groups is limited. The Commission, moreover, does not advance any evidence that state public service agencies will perform this service, and, in fact, the Commission's own staff in comments concerning another exemption proceeding suggest that state agencies do not carry out this function very well. "The designated agency . . . cannot circulate the environmental notice quickly enough to afford any meaningful opportunities for involvement in the ICC's decisionmaking process." Comments of the Section of Energy and Environment on Class Exemption for the Construction of Connecting Tracks under 49 U.S.C. 10901. J.A. at 300. We therefore give little weight to this method of notification.

Five days after the notice of exemption is published in the Federal Register, the EA prepared by the Commission's staff will be publicly available. Parties and intervenors then have fifteen days to request a stay.[24] If the Commission required a detailed statement and a showing of irreparable injury and probability of success, this time period might be inadequate as a matter of law, but since, as we have stated, the Commission has

[24] The Commission has stated that it will no longer require stay petitions to be filed within ten days of Federal Register publication. Stay petitions may therefore be filed within the twenty day period allotted for petitions to reconsider.

indicated it will grant a stay upon a minimal showing, we cannot hold that fifteen days is always impermissibly short. Where, in a particular abandonment proceeding, special circumstances render fifteen days unreasonably short even to make a minimal showing, the Commission could grant an extension in order to comply with NEPA. We therefore decline to rule that the Commission's procedures, as set forth in the regulation and modified by subsequent action, are facially inconsistent with NEPA.

In addition to its arguments regarding lack of compliance with NEPA, RTC asserts that the Commission's procedures violate section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f (1982). Like section 102 of NEPA, section 106 of the Historic Preservation Act is a "stop, look, and listen" provision; it requires federal agencies to take into account the effect of their actions on structures eligible for inclusion in the National Register of Historic Places. As the Commission recognized in its first rulemaking (prior to remand), track abandonment may affect historic structures. *Exemption of Out of Service Rail Lines*, 366 I.C.C. 885, 890 (1983). In order to fulfill its obligations under the Historic Preservation Act, the Commission requires applicants for abandonment exemptions to include in their application information concerning whether any sites listed in the National Register of Historic Places are affected. Furthermore, the applicant must submit detailed descriptions of any affected structures fifty years old or older to the appropriate State Historic Preservation Office. 49 C.F.R. 1105.7(c)(10) (1987).

RTC's attack on the Commission's Historic Preservation Act procedures is similar to its arguments concerning NEPA. In particular, RTC asserts that publication of notice of abandonment prior to consultation with state and federal agencies concerning historic preservation violates the Act. For the reasons stated in our discussion of NEPA, we do not agree. So long as the record in an

individual abandonment shows that the required consultations and deliberations concerning historic preservation occur before the exemption becomes effective, the purposes of the Historic Preservation Act are met.

Section 8(d) of the National Trails System Act, 16 U.S.C. § 1247(d) (Supp. II 1984), directs the Commission to encourage state and local agencies and private parties to establish recreational trails along abandoned rail lines. *See also* 49 U.S.C. 10906. Such use serves to preserve established rights-of-way for future reactivation as working railroads—hence the name "rail banking." Section 1247(d) provides that any line preserved in this way shall not be treated as abandoned—thus preventing rights-of-way obtained through easements from reverting to their owners upon the cessation of railroad use. *See generally Washington State Dep't of Game v. ICC*, 829 F.2d 877 (9th Cir. 1987). RTC contends that the Commission has failed to consider its obligations under section 8(d) in issuing the abandonment regulation. We disagree. The regulation specifically provides that persons interested in interim use of abandoned rail lines as recreational trails may submit evidence, and refers the reader to 49 C.F.R. § 1152.29 (1987) which sets out the statement required of prospective users. Although the regulation requires the statement be submitted within ten days, the Commission has informed the court that "it would accept and act on late-filed Trails Act requests so long as it still retains jurisdiction to do so." Brief of I.C.C. and United States at 37.[25] Private organizations and state or local agencies interested in interim use of rail lines may monitor the Federal Register and upon

[25] The Commission has stated that according to 49 U.S.C. § 10505(c), its jurisdiction over exempted abandonments would appear to extend indefinitely. Brief at 37 n.28. *See also* Ex Parte No. 274 (Sub-No. 13), *Rail Abandonments—Use of Rights of Way as Trails—Supplemental Trails Act Procedures*, decided December 2, 1987.

notification of an abandonment, may make the submission required by § 1152.29. We reject FTC's contention that the time allotted under the Commission's regulation as modified is not adequate, and we do not believe the Commission has ignored its obligations under section 8(d) of the National Trails Systems Act.[26]

[26] RTC adverts to, but does not directly challenge, the Commission's interpretation of section 8(d) as requiring it to condition rail-to-trail conversions on negotiations of voluntary agreements between abandoning railroads and prospective interim trail users. *See generally Washington State Dep't of Game v. ICC*, 829 F.2d 877 (9th Cir. 1987). We have no occasion, therefore, to pass on the reasonableness of that interpretation.

MIKVA, *Circuit Judge, concurring in part and dissenting in part*: Abandoning rail lines can be a crucial cost-saving measure for a rail carrier trying to revitalize its operations. But it can also adversely affect local shippers and have a devastating impact on the economic development strategies of cities and towns. Recognizing that rail infrastructure is a vital national resource, Congress struck a careful balance in its regulation of abandonments—attempting to minimize delays where abandonment was truly the best course, while facilitating preservation of rail lines that offered continued commercial (or other) benefits. A key intermediary in Congress' scheme for preserving viable rail lines was state government. Yet, in the exemption regulation now before us, the Interstate Commerce Commission ("ICC" or "Commission") effectively disregarded the crucial role that Congress delegated to states. Accordingly, I dissent from that part of today's decision that permits rail abandonments without providing states with meaningful advance notice; I otherwise concur in the majority's opinion.

As the majority opinion explains, in order to justify the exemption of railroad activity from a federal law, the ICC must demonstrate that the particular law "is not necessary to carry out the transportation policy of [the United States]." 49 U.S.C. § 10505(a)(1) (1982). That national policy is specified in another section of the rail statute, and it includes this goal: "[T]o cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in [federal railroad law]." 49 U.S.C. § 10101a(9) (1982). The goal of having states adhere to federal "standards" should not be interpreted narrowly. Congress has done more than simply instruct states to abide by federal regulations; it has delegated to states a specific role in the implementation of national rail policy. States' compliance with federal "standards" must therefore be read in the broad sense: federal policy should facilitate states' performance of

the duties assigned to them. *See Illinois Commerce Commission* v. *ICC*, 787 F.2d 616, 631 (D.C. Cir. 1986) (noting that "*any* sort of cooperation with the states on transportation matters" is likely to further the nation's rail policy goal (emphasis added)).

To evaluate whether the ICC's exemption of railroad abandonments is proper, this court must therefore determine whether the statutes from which abandonments have been exempted are "not necessary" to the goal of "cooperat[ing] with the states on transportation matters." I believe the exemption fails that test in one crucial respect.

Since 1976, Congress has required railroads to maintain System Diagram Maps and to make these available to the Commission and the public. The maps must be regularly updated to show "railroad lines potentially subject to abandonment" as well as "each railroad line for which the carrier plans to file an application for a[n abandonment] certificate." 49 U.S.C. § 10904(e)(2) (1982). The importance of the system maps to Congress' larger regulatory scheme is made clear in one of the restrictions imposed on abandonments. Congress gave state governments the power to block the abandonment of any rail line that has not been "described and identified in the diagram . . . that was submitted to the Commission at least 4 months before the date on which the [abandonment] application was filed." 49 U.S.C. § 10904(e)(3) (1982).

Congress thus believed that states needed at least four months' advance notice about potential abandonments in order to fulfill their role of protecting local economic and transportation needs. That protective role encompassed multiple responsibilities. For example, Congress established a mechanism for reviving rail lines that were targeted for abandonment, through an offer to subsidize or an offer to purchase the line by a "financially responsi-

ble person." 49 U.S.C. § 10905(d)(1) (1982). Such a "person" includes "a government authority," *id.*, and obviously states are the primary governments intended. Similarly, Congress created a "feeder development program" for the rescue and upgrading of lines that railroads have designated on their system maps as subject to abandonment but have not yet sought to abandon. 49 U.S.C. § 10910 (1982). Once again, financially responsible persons including "a government authority" are expected to initiate such feeder development proposals. States are also designated among the prime movers in the interim trail use program that Congress established for soon-to-be-abandoned rail lines. *See* 16 U.S.C. § 1247(d) (Supp. II 1984); 49 C.F.R. § 1152.29 (1987). Finally, although states are not expressly named, they are clearly expected to initiate preservation of rail lines for "highways, other forms of mass transportation, conservation, energy production or transmission, or recreation" under the "Sale for Public Purposes" provision that Congress enacted. 49 U.S.C. § 10906 (1982). *See* Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 809(b)(2), 90 Stat. 31, 146 (authorizing grants "to *State* and local governmental entities to enable them to plan, acquire, and develop recreational or conservational facilities on abandoned railroad rights-of-way" (emphasis added)) (codified at 49 U.S.C. § 10906 note (1982)).

This is a formidable array of responsibilities for states to carry out. It is not hard to fathom Congress' purpose, therefore, in granting states at least four months' advance notice of a railroad's intent to abandon a rail line. Indeed, when Congress enacted the System Diagram Map requirements in 1976, the Senate Committee that developed the plan explained its overall objective in this fashion: "Of paramount concern to the Committee is the impact of rail abandonments on local communities, mostly rural in character. The Local Rail Service Assistance

Program offers these communities an opportunity to keep their rail service. It rightfully places the responsibility for making the decisions on the essentiality of local rail service *with State and local officials*." S. Rep. No. 499, 94th Cong., 1st Sess. 44 (1975) (emphasis added).

The ICC exemption regulation that is now before this court exempts certain abandonments from the four-month requirement for designations on the System Diagram Maps. Rail lines eligible for this exemption include not only those lines that have been completely unused for two years but also segments that have carried only overhead traffic for that period. In lieu of the four-month advance notice, the ICC now permits a rail carrier seeking to abandon such rail lines simply to notify the state ten days before it notifies the ICC. The state then has no more (and possibly less) than forty days to request a stay of the effective date of the abandonment. If the ICC does not stay the abandonment, the railroad is free to dismantle the track, sell the rail line, or otherwise dispose of the land and right-of-way, beginning twenty days after the deadline for requesting a stay has expired. Obviously, these severe time constraints will make it extremely difficult, if not impossible, for states to carry out their responsibilities with respect to exempt abandonments.

In our court's initial review of this exemption regulation two years ago, we chastised the ICC for failing even to examine the impact of the exemption on state governments:

> We think the Commission should have considered the many comments submitted by the states decrying the lack of notice of proposed abandonments . . . . From aught that appears, the Commission paid no heed to these comments.

Illinois Commerce Commission v. *ICC*, 787 F.2d at 631. On remand, however, the Commission responded to the

court's concerns in a superficial and conclusory manner. "System diagram map notice is not essential to State rail planning in this instance," the ICC blithely declared. 2 I.C.C. 2d 146, 153 (1968). "Lines generating no traffic are unlikely to contribute to a State's business economy, but if such a line is considered crucial, a State should monitor its activity because nonuse usually heralds eventual abandonment." *Id.* at 153-54. The ICC's notion that states only worry about rail lines that currently "contribute to [their] business economy" betrays a disregard for states' multiple responsibilities. A state government must also consider whether lines are being relied upon (or could be used) for future economic development. It must ascertain, as well, whether the railbed may be useful for highways, mass transit, recreational conversion or other purposes. There are thousands of miles of rail lines in this country that are potential candidates for abandonment. *See, e.g.*, S. Rep. No. 499, 94th Cong., 1st Sess. 43 (1975). The Commission's cavalier suggestion that state governments can readily monitor the status of all of these rail lines borders on the fanciful.

Yet, the burden imposed on states is even more unreasonable than the ICC's description suggests. It must be remembered that the rail lines that qualify for exempt abandonment include lines that are currently carrying rail traffic but do not contain local shippers who originate or receive any shipments. Thus, a rail segment that bears overhead traffic in the middle of a longer line that does service local shippers is fully eligible for the abandonment exemption—a fact somewhat obscured by the Commission's description of eligible lines as lines experiencing "nonuse." The notion that states should scrutinize active rail lines within their borders, ascertaining which are the segments that generate no local traffic and whose overhead traffic could be rerouted, is patently ludicrous. The Commission's cursory treatment of this problem also disregards this court's express instructions following our

previous review. In remanding the case, this court directed the ICC "to reevaluate the impact of the exemption [in light of the fact that the definition of 'out of service'] was extended to lines over which overhead traffic is traveling." 787 F.2d at 635.

The majority in today's decision cloaks the agency's inadequate analysis with the mantle of reasoned inquiry. The agency, we are told, "squarely responded" to this court's concerns. Majority opinion ("maj. op.") at 14. But my colleagues do no more than recite the agency's *ipse dixit* about the capacity of states to "monitor" rail lines, assuring us that the ICC's analysis is "predicated . . . on the agency's experience," Maj. op. at 16.

The majority also relies on the Commission's conclusion that "the benefits of additional notice accruing to the small number of States and shippers affected by abanments of out-of-service lines are outweighed by the costs to railroads both in maintaining the Maps and in delaying desired abandonments for four months." Maj. op. at 14-15. Such a cost-benefit analysis may be noteworthy. It may even be correct. But it is no substitute for the analysis that Congress expressly required. The ICC must find that the System Diagram Maps are "not necessary" to the goal of "cooperat[ing] with the states on transportation matters." The Commission's attempt to do that is a model of unreasoned decisionmaking that is not supported by the evidence. I would hold this aspect of the exemption regulation arbitrary and capricious and remand for the ICC to either fish or cut bait: if there are reasons why this important congressional protection of states' transportation concerns can be waived, they should be stated; otherwise, the exemption regulation can be effective without such a waiver.

Apparently, my colleagues dispute this last point. They imply—in a footnote—that the exemption of abandonments really cannot be effective if the system map re-

quirement is reinstated. By reinstating this requirement, the majority suggests, we will "tear asunder the carefully crafted scheme erected by the Commission." Maj. op. at 15-16 n.15. The majority has chosen the wrong "scheme" as the object of its reverence. It is *Congress'* carefully crafted scheme that holds primary claim to our respect. And it is the ICC that has "torn asunder" Congress' scheme, making it all but impossible for states to carry out their responsibilities in promoting the national rail policy. The ICC, moreover, has accomplished this result without demonstrating its necessity. The Commission—like today's majority—seems to view exemptions as a package deal: abandonments must be exempt from *every* constraint or none at all. It is this all-or-nothing approach to deregulation that "tears asunder" legislative policy and that we should reject.

By exempting certain rail abandonments from statutory limitations, the ICC sought a worthwhile goal: to make it easier for railroads to convert unproductive property into useful assets. But this benefit can be largely preserved, even if the railroads are required to continue updating the system maps. Unless the ICC can demonstate that the maps are not needed for the purpose they were intended to serve, I would salvage this important element of Congress' "carefully crafted scheme."

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1687 **September Term, 1987**

Illinois Commerce Commission
and Patrick W. Simmons, Petitioners

v.

Interstate Commerce Commission
and United States of America, Respondents

---

and consolidated cases 87-1015 and 87-1278

Before: MIKVA, STARR and SILBERMAN, Circuit Judges

O R D E R

It is ORDERED, by the Court, *sua sponte,* that Judge Mikva's oipinion concurring in part and dissenting in part, filed on this date be, and hereby is, amended as follows:

Page 7, line 4 delete "5-16" and insert in lieu thereof "15-16".

Per Curiam
For the Court
Constance L. Dupre

by: /s/ Edith DeYoung
Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit
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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1687 **September Term, 1987**

Illinois Commerce Commission
and Patrick W. Simmons, Petitioners

v.

Interstate Commerce Commission
and United States of America, Respondents

Association of American Railroads,
Rails to Trails Conservancy, and
Iowa Trails Council, Intervenors

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and consolidated cases 87-1015 and 87-1278

PETITIONS FOR REVIEW OF AN ORDER OF
THE INTERSTATE COMMERCE COMMISSION

Before: MIKVA, STARR and SILBERMAN, Circuit Judges

JUDGMENT

This cause came on to be heard on the petition for review of an order of the Interstate Commerce Commission and was argued by counsel. On considreation thereof, it is

ORDERED and ADJUDGED, by the Court, that the petitions for review are denied, in accordance with the Opinion of the Court filed herein this date.

Per Curiam
For the Court

/s/ Constance L. Dupre
Constance L. Dupre
Clerk

Date: May 24, 1988
Opinion *Per Curiam*.
Opinion concurring in part and dissenting in part filed by Circuit Judge Mikva.

United States Court of Appeals
For the District of Columbia Circuit
FILED MAY 24 1988
CONSTANCE L. DUPRE
Clerk

APPENDIX D

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1836

ILLINOIS COMMERCE COMMISSION and
PATRICK W. SIMMONS, PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

ASSOCIATION OF AMERICAN RAILROADS,
ILLINOIS CENTRAL GULF RAILROAD COMPANY,
INTERVENORS

No. 83-1868

THE COMMISSIONER OF TRANSPORTATION OF THE
STATE OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

PEOPLE OF THE STATE OF CALIFORNIA, *et al.*,
ASSOCIATION OF AMERICAN RAILROADS, INTERVENORS

On Petition for Review of Orders of the
Interstate Commerce Commission

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Argued October 19, 1985

Decided April 4, 1986

Gordon P. MacDougall, and *James E. Weging*, for petitioners in No. 83-1836.

William J. Dwyer, for petitioner in No. 83-1868.

Louis Mackall, Attorney, Interstate Commerce Commission, with whom *J. Paul McGrath*, Assistant Attorney General, Department of Justice, *John Broadley*, General Counsel, Interstate Commerce Commission, at the time the brief was filed, *Ellen D. Hanson*, Associate General Counsel, Interstate Commerce Commission, *Barry Grossman* and *Edward T. Hand*, Attorneys, Department of Justice, for respondents.

James I. Collier, Jr., for intervenor Association of American Railroads.

Howard D. Koontz, for intervenor, Illinois Central Gulf Railroad Company.

Before ROBINSON, *Chief Judge*, and WRIGHT and WALD, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* ROBINSON.

ROBINSON, *Chief Judge*: These petitions for review challenge an order of the Interstate Commerce Commission deregulating abandonments of "out of service" rail lines.[1] Purportedly exercising authority conferred by the Staggers Rail Act of 1980,[2] the Commission exempted

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[1] Abandonment is characterized by an intent to discontinue, either permanently or indefinitely, transportation service over the line. *Black* v. *ICC*, 246 U.S.App.D.C. 12, 18-19, 762 F.2d 106, 112-113 (1985). Permanent abandonment enables the railroad to remove the track and dispose of the land. See *Exemption of Out of Service Rail Lines*, 366 I.C.C. 885 (1983).

[2] Pub. L. No. 96-448, 94 Stat. 1895 (1980) (codified in scattered sections of 49 U.S.C.) (amending the Interstate Commerce Act. ch. 104, 24 Stat. 379 (1887) (codified as amended in 49 U.S.C. subtitle IV (1982)) [each hereinafter cited as codified].

segments of line that have not been used for at least two years, and those upon which no traffic has originated or terminated for a like period,[3] from compliance with statutory standards and procedures that otherwise would govern abandonments.[4] Petitioners[5] contest this action, contending that the exemption is arbitrary and unsupported by essential findings. Perceiving merit in some of petitioners' arguments, we remand these cases to the Commission for further consideration.

I. THE BACKGROUND

A. *The Statutory Framework*

The Staggers Act erects a comprehensive scheme of standards and procedures for abandonments of rail lines. Under its provisions, a railroad subject to the Commission's jurisdiction[6] may abandon a segment of line only

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[3] The term "out-of-service line," as employed by the Commission, is not a completely accurate description of the line exempted since it may serve traffic neither originating nor terminating thereon. An "out-of-service" line is, however, out of service to local traffic.

[4] 49 C.F.R. § 1152.50 (1985) sets forth the text of the exemption as amended. The amendment expanded the exemption to encompass discontinuance of service and trackage rights over rail lines out of service for two years. See *Exemption of Out of Service Lines* (Discontinuance of Service and Trackage Rights), 49 Fed. Reg. 17002 (1984). Separate litigation before this court concerns that expansion. *Illinois Commerce Comm'n* v. *ICC*, No. 84-1164 (D.C. Cir.) (filed Apr. 27, 1984).

[5] The petitioners in No. 83-1836 are the Illinois Commerce Commission and Patrick W. Simmons, the Illinois Legislative Director for the United Transportation Union. The Commissioner of Transportation of New York is the petitioner in No. 83-1868. The Association of American Railroads has intervened in both cases, and the State of California and its Public Utilities Commission have intervened in No. 83-1868.

[6] The basic parameters of the Commission's jurisdiction are established by 49 U.S.C. § 10501 (1982).

if the Commission finds that the present or future public convenience and necessity will be served thereby.[7] The railroad must apply to the Commission for a certificate of abandonment[8] and widely publicize the proposal. It must notify states directly affected and shippers who made significant use of the line during the preceding twelve months,[9] and it must publish a notice in local newspapers and post it in stations along the line.[10] The railroad must also maintain a complete diagram of its transportation system depicting lines projected for or potentially subject to abandonment, and must submit to the Commission and publish any amendments affecting its accuracy.[11] When an abandonment is opposed by a state, political subdivision, or significant user of the line during the previous twelve months, a certificate of abandonment ordinarily will not issue unless the line was described in the diagram or an amendment at least four months prior to the application.[12]

If the Commission receives no protest within 30 days of the railroad's application, it must find that the sought-after abandonment is consistent with the public convenience and necessity, and issue a certificate of abandonment.[13] If there is a timely protest, the Commission must then determine whether an investigation is needed.[14] Time limits are set for completion of any investigation, rendition of the Commission's decision without or after

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[7] *Id.* § 10903(a).

[8] *Id.* § 10904(a)(1).

[9] *Id.* § 10904(a)(3).

[10] *Id.*

[11] *Id.* § 10904(e)(2).

[12] *Id.* § 10904(e)(3).

[13] *Id.* § 10904(b).

[14] *Id.* § 10904(c)(1).

investigation, and issuance of any certificate of abandonment.[15]

A Commission finding that the proposed abandonment fosters the public convenience and necessity does not, however, lead inexorably to a certificate of abandonment. Elaborate provision is made for offers to purchase the line or financially subsidize its operation as means of avoiding an actual abandonment.[16] The Commission must publish its finding in the Federal Register [17] and the railroad must promptly furnish to anyone potentially interested a variety of information enabling calculation of an adequate purchase price or subsidy.[18] Should a timely offer [19] meeting a statutory formula be made by a financially responsible person,[20] issuance of a certificate of abandonment is postponed pending negotiation of an agreement by the parties [21] or establishment by the Commission of the conditions of sale or subsidy.[22] A firm sale of the line assures its operation for at least two years.[23]

It is from adherence to this statutory scheme that the Commission, invoking Section 10505 of the Staggers Act,

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[15] See *id.* § 10904(c) (2), (3).

[16] See *id.* § 10905.

[17] *Id.* § 10905(c).

[18] *Id.* § 10905(b).

[19] See *id.*

[20] See *id.* § 10905(d).

[21] *Id.* § 10905(d), (e).

[22] *Id.* § 10905(f) (1), (2).

[23] *Id.* § 10905(f) (4). Irrespective of receipt or consummation of an offer to purchase or subsidize, the Commission, whenever it finds that the line can serve a public purpose—for example, another form of transportation—may condition its disposal in order to make it available for that purpose. See *id.* § 10906.

has exempted out-of-service lines. With exceptions not pertinent here,[24] Section 10505(a) requires the Commission to exempt a transaction from the operation of a provision governing interstate rail transportation if its application is not essential to effectuation of the rail transportation policy delineated in Section 10101a,[25] and if either the transaction is of limited scope or application of the statutory provision is not needed to protect shippers from an abuse of market power.[26] We now turn

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[24] See *id.* § 10505(e), (g) quoted *infra* note 26.

[25] *Id.* § 10101a, quoted *infra* note 67.

[26] Section 10505 provides:

> (a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—
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> (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
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> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.
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> (b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.
>
> (c) The Commission may specify the period of time during which an exemption granted under this section is effective.
>
> (d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.
>
> (e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and

to the proceeding from which the exemption emanated to ascertain whether the Commission complied with these mandates.

B. *The Administrative Proceeding*

The Commission issued a notice proposing a rule exempting from regulation abandonments of rail lines that have been out of service for two years or more.[27] The notice explained that the Commission had recently granted a series of case-by-case exemptions enabling abandonment of lines unused for extended periods,[28] and that, because those lines had handled no traffic for many years, it had in no instance found any evident need for the line or any adverse effect on shippers, interstate commerce, or the rail transportation policy.[29] On the basis

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claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11701 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

[27] *Exemption of Out of Service Rail Lines*, 47 Fed. Reg. 13538 (1982) (notice of rulemaking).

[28] *Id.* at 13538-13539.

[29] *Id.* The prior exemption decisions cited by the Commission had paved the way for railroads to dispose of the track and land comprising lines that had been out of operation and without maintenance for periods ranging from ten to as long

of this experience, the Commission surmised that a blanket exemption of out-of-service lines might be appropriate.[30]

The notice of the upcoming rulemaking proceeding stated that "[p]rior approval of abandonment of out of service rail lines does not appear to be necessary to carry out the goals of the rail transportation policy outlined in Section 10101a."[31] An "out-of-service line" was defined as one over which no local or overhead traffic[32] has moved for two years, but commenters were asked to discuss whether the term should also include lines carrying overhead traffic that could be rerouted over another line of the carrier.[33] The notice further stated that "exempting the transactions may facilitate at least one of the policy objectives of Section 10101a—to minimize the need for regulatory control and to require expeditious decisions when regulation is necessary."[34] The notice declared that the exemption would not adversely affect shippers, but would protect rail labor and save railroads the expense

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as 20 years. *Id.* n.1 (citing *Union Pac. R.R. & Oregon Short Line R.R.*, I.C.C. Finance Docket No. 29749 (Nov. 23, 1981) (10 years); *Louisville & N. R.R.*, I.C.C. Finance Docket No. 29774 (Dec. 11, 1981), Joint Appendix (J. App.) 108 (24 years); *Atchinson, T. & S.F. Ry.*, I.C.C. Finance Docket No. 29785 (Dec. 23, 1981), J. App. 106 (indefinite number of years) and *Burlington N. R.R.*, I.C.C. Finance Docket No. 29817 (Feb. 10, 1982), J. App. 110 (11 years)).

[30] *Exemption of Out of Service Rail Lines, supra* note 27, 47 Fed. Reg. at 13538-13539.

[31] *Id.* at 13539.

[32] "Local traffic" originates or terminates at some point on the line. Brief for Illinois Petitioners at 9 n.9. "Overhead traffic," alternately known as "bridge traffic," *id.* at 22, originates and terminates at points beyond the line.

[33] *Exemption of Out of Service Rail Lines, supra* note 27, 47 Fed. Reg. at 13539.

[34] *Id.*

of preparing applications and the Commission the expense of processing them.[35]

The Commission deemed the proposed exemption in keeping with Section 10505(a)'s requirement of either a transaction of limited scope or an absence of need for application of the statutory abandonment provisions to protect shippers from an abuse of market power. The Commission reasoned that the exemption would have no operational or competitive impact because it would simply allow immediate de jure recognition of an already-existing de facto discontinuance of service.[36] The Commission considered regulation unnecessary to protect shippers from market-power abuses because any line eligible for exemption would have lain unused for at least two years.[37]

The Commission envisioned an abbreviated procedure for effectuating an exempt abandonment. To begin with, the railroad would notify the public service commission

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[35] *Id.* The Commission did not explain just how this saving of costs would occur. As one commenter later pointed out,

> the expenses of abandonment applications can be avoided by filing requests for exemption as to individual abandonment transactions . . . . [T]he issue is not whether or not the preparation and processing of *abandonment applications* for out of service lines are unduly expensive and burdensome, but rather . . . whether or not the preparation and processing of *individual requests for exemption* of such lines are unduly expensive and burdensome.

Comments of Growmark, Inc. (filed Apr. 30, 1982) at 8-9 J. App. 143, 151-152 (emphasis in original). While the conclusion that all concerned would benefit by the exemption does not, strictly speaking, fall within the purview of the § 10505 analysis, it does intertwine with several of the rail transportation policies. See, e.g., 49 U.S.C. § 10101a(3), (4), (13) (1982).

[36] *Exemption of Out of Service Rail Lines, supra* note 27, 47 Fed. Reg. at 13539.

[37] *Id.*

or equivalent agency in each state through which the line proposed for abandonment runs.[38] One week prior to actual abandonment, the railroad would notify the Commission,[39] which then would publish notice of the abandonment in the Federal Register,[40] and any petition for revocation of the exemption would become due within 15 days thereafter.[41] The Commission anticipated that, because of the abandoned line's two years out of service, the railroad would receive no offers to purchase or subsidize the line,[42] and suggested that anyone with a continuing transportation interest in the line could petition for revocation of the exemption.[43]

The Commission received 44 comments in response to the notice.[44] The railroads generally supported the exemption and favored broadening it to include lines carrying only overhead traffic,[45] but feared that the revocation procedure might be available even after the tracks had been physically removed.[46] Opponents of the exemption—primarily states, shippers, and their representatives—protested on a number of grounds.[47] They expressed ap-

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[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 13540.

[43] *Id.*

[44] See J. App. 7-178.

[45] See, e.g., Comments of Family Lines Rail System (filed Apr. 30, 1982) at 2, J. App. 70, 72; Comments of Norfolk & Western Railway Company (filed Apr. 27, 1982) at 3, J. App. 47, 50.

[46] See Comments of Family Lines Rail System, *supra* note 45, at 3-4, J. App. 73-74.

[47] See Comments of California Department of Transportation (filed Apr. 23, 1982) at 1, J. App. 23; Comments of Idaho

prehension that railroads could and would use embargoes [48] to obtain out-of-service status that would permit

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Transportation Department (filed Apr. 12, 1982), J. App. 11; Comments of Illinois and Illinois Commerce Commission (filed Apr. 30, 1982) at 4-5, J. App. 119, 123-124; Supplement to Comments of Illinois Commerce Commission (filed May 10, 1982) at 2, J. App. 177-178; Comments of Kansas Corporation Commission (filed Apr. 22, 1982) at 1-2, J. App. 14-15; Comments of Montana Citizens Freight Rate Association (filed Apr. 26, 1982), J. App. 13; Comments of Montana Department of Commerce and Montana Wheat Research and Marketing Committee (filed Apr. 30, 1982) at 4-5, J. App. 131, 135-136; Comments of Montana Farm Bureau Federation (filed Apr. 23, 1982), J. App. 26; Comments of Montana Public Service Commission (filed May 3, 1982) at 3, J. App. 156, 159; Comments of California and Public Utilities Commission of California (filed May 3, 1982) at 2, J. App. 162, 163; Statement on Behalf of Public Utility Commissioner of Oregon (filed May 5, 1982) at 2, J. App. 170, 172; Comments of Railway Labor Executives Association (filed Apr. 30, 1982) at 2-3, J. App. 112, 113-114; Comments of Patrick W. Simmons (filed Apr. 30, 1982) at 6, J. App. 89, 96; Comments of Washington Department of Transportation (filed Apr. 27, 1982) at 1, J. App. 45.

[48] A railroad might issue unilaterally an embargo to justify a discontinuance of service as a temporary emergency measure when it is unable to perform its duties as a common carrier. *ICC* v. *Baltimore & A. R.R.*, 398 F.Supp. 454, 462 (D.Md. 1975), *aff'd*, 537 F.2d 77 (4th Cir.), *cert. denied*, 429 U.S. 859, 97 S.Ct. 159, 50 L.Ed.2d 136 (1976). "Because both abandonment and embargo entail a cessation of service, the question of whether an embargo has been transmuted into an unlawful abandonment revolves largely around the length of the cessation and the intent of the railroad." *Id.* (citations omitted). See also *ICC* v. *Chicago & N.W. Transp. Co.*, 533 F.2d 1025, 1028 (8th Cir. 1976). The final regulation on exemption declared that the availability of Commission complaint and enforcement procedures, see 49 U.S.C. § 11702(a)(1) (1982), would forestall potential problems with embargoes. *Exemption of Out of Service Rail Lines*, *supra* note 1, 366 I.C.C. at 887-888. Petitioners dispute this ground because it pertained only to complaints filed with the Commission and not those filed in a federal court; they claim that states and

them to invoke the exemption.[49] They further argued that Section 10505 does not authorize exemption of a class of transactions, but only exemption of individual transactions,[50] and they objected to expansion of the definition of "out of service" to include lines handling overhead traffic.[51] They also contended that the proposed exemp-

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shippers traditionally resort directly to the courts when a line is unlawfully embargoed because the Commission is without power to issue an injunction. See Letter from Louis Mackall, Office of General Counsel, Interstate Commerce Commission, to George A. Fisher, Clerk, United States Court of Appeals for the District of Columbia Circuit (filed Oct. 11, 1984); Reply Brief for Illinois Petitioners at 9-10, citing *City of Miami* v. *ICC*, 669 F.2d 219, 221 n.10 (5th Cir. 1982). Since the Commission has amended the regulation to render any line subject to a complaint in a federal district court regarding cessation of service ineligible for the exemption, *Exemption of Out of Service Lines* (Discontinuance of Service and Trackage Rights), 50 Fed. Reg. 8335 (1985), this aspect of petitioners' challenge is now moot. See *Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10, 90 S.Ct. 1209, 1216 n.10, 39 L.Ed.2d 505, 515 n.10; *Alton & So. Ry.* v. *International Ass'n of Machinists & Aerospace Workers*, 150 U.S.App.D.C. 36, 41-42, 463 F.2d 872, 877-878 (1972); *Burbank* v. *Twomey*, 520 F.2d 744, 747-748 (7th Cir. 1975).

[49] See, e.g., Comments of Illinois Commerce Commission, *supra* note 47, at 4-5, J. App. 123-124; Comments of Montana Department of Commerce and Montana W[illegible]t Research and Marketing Committee, *supra* note 47, at 4-5, J. App. 135-136.

[50] Comments of Growmark, Inc., *supra* note 35, at 3-8, J. App. 146-151; Comments of Ohio Rail Transportation Authority (filed Apr. 30, 1982) at 2-3, J. App. 75, 76-77; Comments of Patrick W. Simmons, *supra* note 47, at 7-8, J. App. 97-98. This contention has been persuasively rejected by the Commission, *Railroad Consolidation Procedures*, 363 I.C.C. 200 (1980), *aff'd sub nom. Simmons* v. *ICC*, No. 82-1495 (D.C. Cir. Feb. 23, 1983) (memorandum decision), and is not reasserted on the present review.

[51] See Comments of Growmark, Inc., *supra* note 35, at 11, J. App. 154; Supplement to Comments of Illinois Commerce

tion procedures provided insufficient notice,[52] that the Commission improperly relied on past instances in which exemptions were granted on a case-by-case basis,[53] and that the Commission had not supported its belief that the exemption would not significantly affect the human environment or energy resources.[54]

Ultimately, the Commission issued its decision and order in favor of an exemption.[55] The Commission re-

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Commission, *supra* note 47, at 2, J. App. 178; Comments of Kansas Department of Transportation (filed May 3, 1982) at 3, J. App. 165, 168; Comments of Montana Public Service Commission, *supra* note 47, at 4, J. App. 160.

[52] Notice problems were addressed in several different contexts. One was difficulty anticipated from the short spaces of time allowed for public comment on the proposed exemption and for responding to applications for exemptions in individual cases. See Comments of Mrs. Martin Alzheimer (filed Apr. 19, 1982), J. App. 25; Comments of Georgia Public Service Commission (filed Apr. 21, 1982) at 2, J. App. 21, 22; Comments of Minnesota Department of Transportation (filed Apr. 23, 1982), J. App. 27. Inadequacy of notice was also cited in connection with objections to the length of time—two years out of service—required before a line would qualify for the exemption. See Comments of Illinois and Illinois Commerce Commission, *supra* note 47, at 4-5, J. App. 123-124; Comments of New Hampshire Public Utilities Commission (filed Apr. 27, 1982) at 1-2, J. App. 43, 43-44. Commenters also indicated that notice of intent to abandon, provided through the railroad's amendments to its system diagram, was essential to the states' rail planning and support efforts. See Comments of Kansas Department of Transportation, *supra* note 51, at 4, J. App. 168; Comments of the Maryland State Railroad Administration (filed Apr. 28, 1982) at 2-4, J. App. 56, 58-60; Comments of Washington Department of Transportation, *supra* note 47, at 2, J. App. 46.

[53] See Comments of Patrick W. Simmons, *supra* note 47, at 2, J. App. 102; Comments of Washington Department of Transportation, *supra* note 47, at 1, J. App. 45.

[54] See Comments of Illinois and Illinois Commerce Commission, *supra* note 47, at 7, J. App. 126.

[55] *Exemption of Out of Service Rail Lines, supra* note 1.

iterated its earlier view that the exemption would comport with the requirements of Section 10505(a).[56] It adopted as findings the factual assumptions advanced in the notice of rulemaking, but altered the exemption somewhat in an effort to alleviate problems discussed in the comments.[57] The Commission decided that out-of-service lines should "include those lines where there may still be overhead traffic, so long as there has been no traffic originating or terminating on the line for at least 2 years."[58] The reason assigned for this conclusion was that routing of overhead traffic over a given line may be a "matter of business efficiency,"[59] and that "[o]verhead traffic routing is a matter of managerial discretion and is not of controlling importance in most abandonment proceedings."[60] The Commission further asserted that the change in definition of "out of service" would not affect shippers because they would continue to receive rail service.[61]

II. The Rail Transportation Policy

In reviewing the Commission's exemption decisions, our task is to determine whether its action was arbitrary, capricious, an abuse of discretion or otherwise contrary to law.[62] While the scope of review undoubtedly is nar-

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[56] 366 I.C.C. at 885, 891-892.

[57] *Id.* at 885. For example, the Commission expanded somewhat the much-criticized notice periods. *Id.* at 889; see also note 52 *supra*.

[58] *Exemption of Out of Service Rail Lines*, *supra* note 1, 366 I.C.C. at 887.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Black* v. *ICC*, *supra* note 1, 246 U.S.App.D.C. at 23, 762 F.2d at 117; *Brae Corp.* v. *ICC*, 238 U.S.App.D.C. 352, 367, 740 F.2d 1023, 1038, *cert. denied*, —— U.S. ——, 105 S.Ct. 2149,

row,[63] we must satisfy ourselves that the Commission "consider[ed] all critical aspects of the problems before it, and . . . articulate[d] a reasoned explanation for its action, including 'a rational connection between the facts found and the choice made.'"[64] We now examine the Commission's decision in light of each of petitioners' three principal challenges to the exemption of out-of-service lines[65] to determine whether it withstands an application of these principles.

One of the two findings that Section 10505(a) makes a prerequisite to an exemption from operation of a provision of the Staggers Act is that "application of [the] provision . . . is not necessary to carry out the transportation policy of section 10101a. . . ."[66] The latter section specifies the fifteen facets of "the policy of the United States Government" "[i]n regulating the railroad

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85 L.Ed.2d 505 (1985); *Simmons* v. *ICC*, 225 U.S.App.D.C. 84, 100, 697 F.2d 326, 342 (1982).

[63] *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443, 466 (1983); *Brae Corp.* v. *United States*, *supra* note 62, 238 U.S. App.D.C. at 367, 740 F.2d at 1038.

[64] *Brae Corp.* v. *United States*, *supra* note 62, 238 U.S.App. D.C. at 367, 740 F.2d at 1038, quoting *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 245, 9 L.Ed.2d 207, 215 (1962).

[65] In this part of our opinion, we consider whether the Commission satisfied the demand of § 10505(a)(1) for dispensability of the forgone statutory provisions to effectuation of the rail transportation policy. In Part III, we examine the Commission's alternative holdings, responsive to § 10505(a)(2), that the exempted transactions are of limited scope and that continued regulation is not needed to protect shippers from abuses of market power. In Part IV, we address petitioners' remaining contention that the Commission failed adequately to protect employee interests.

[66] 49 U.S.C. § 10505(a)(1) (1982).

industry." [67] Petitioners insist that the Commission did not accord the rail transportation policy its important

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[67] Section 10101a provides:

> In regulating the railroad industry, it is the policy of the United States Government—
>
> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
>
> (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;
>
> (3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;
>
> (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
>
> (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;
>
> (6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;
>
> (7) to reduce regulatory barriers to entry into and exit from the industry;
>
> (8) to operate transportation facilities and equipment without detriment to the public health and safety;
>
> (9) to cooperate with the States on transportation matters to ensure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;
>
> [Continued]

role when it undertook to exempt abandonments of out-of-service lines from the regulatory provisions of the Act.

The rail transportation policy, this court has said, "must guide the [Commission] in all its decisions." [68] It is the Commission's responsibility to make sure that application of the statutory provision from which a transaction is exempted is unnecessary to effectuation of that policy.[69] This does not necessarily mean that the Commission must address each and every one of the policy's fifteen components,[70] for some may be completely un-

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[67] [Continued]

> (10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;
>
> (11) to require rail carriers, to the maximum extent practical, to rely on individual rate increases, and to limit the use of increases of general applicability;
>
> (12) to encourage fair wages and safe and suitable working conditions in the railroad industry;
>
> (13) to prohibit predatory pricing and practices, to avoid undue concentration of market power and to prohibit unlawful discrimination;
>
> (14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and
>
> (15) to encourage and promote energy conservation.

49 U.S.C. § 10101a (1982).

[68] *Coal Exporters Ass'n* v. *United States*, 240 U.S.App.D.C. 256, 274 n.22, 745 F.2d 76, 94 n.22 (1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 2151, 85 L.Ed.2d 507 (1985), quoting *Alamo Express, Inc.* v. *ICC*, 673 F.2d 852, 860 (5th Cir. 1982).

[69] See 49 U.S.C. § 10505(a) (1982), quoted *supra* note 26.

[70] *Black* v. *ICC*, *supra* note 1, 236 U.S.App.D.C. at 23-24, 762 F.2d at 117-118; *Coal Exporters Ass'n* v. *United States*,

related to the exemption.[71] It does mean, however, that the Commission must consider all aspects of the policy bearing on the propriety of the exemption[72] and must supply an acceptable rationale therefor.[73] Only by doing so can the Commission avoid the taint of arbitrariness.[74]

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supra note 68, 240 U.S.App.D.C. at 274 n.22, 745 F.2d at 94 n.22. We thus reject the argument of the Illinois petitioners, see Brief for Illinois Petitioners at 14-17; Reply Brief for Illinois Petitioners at 8, that the Commission was under a duty to explicate a treatment of each of the fifteen components of the rail transportation policy.

[71] Cf. *Black* v. *ICC*, *supra* note 1, 246 U.S.App.D.C. at 23, 762 F.2d at 117.

[72] See note 63 *supra* and accompanying text. Petitioner New York, while conceding that § 10505(a)(1) does not require individual findings on each of the fifteen components of the rail transportation policy, asserts that the Commission must at minimum "show substantial compliance with some of them." Reply Brief for Petitioner New York at 12. We think the Commission's responsibility, both minimally and maximally, is to consider all aspects of the policy pertinent to the appropriateness of the exemption.

[73] See note 64 *supra* and accompanying text. While "the [Commission] need not explicitly discuss in its decision each factor enumerated," *Coal Exporters Ass'n* v. *United States*, *supra* note 68, 240 U.S.App.D.C. at 274 n.22, 745 F.2d at 94 n.22, quoting *Alamo Express, Inc.* v. *ICC*, *supra* note 68, 673 F.2d at 860; see also note 70 *supra* and accompanying text, it "is necessary that the essential basis of the [Commission's] rationale be clear enough so that a court can satisfy itself that the [Commission] has performed its function." *Coal Exporters Ass'n* v. *United States*, *supra* note 68, 240 U.S.App.D.C. at 274 n.22, 745 F.2d at 94 n.22, quoting *Alamo Express, Inc.* v. *ICC*, *supra* note 68, 673 F.2d at 860. See *Brae Corp.* v. *United States*, *supra* note 62, 238 U.S.App.D.C. at 367, 740 F.2d at 1038; see also *Bowman Transp.* v. *Arkansas-Best Freight Sys.*, 419 U.S. 281, 285, 95 S.Ct. 438, 442, 42 L.Ed.2d 447, 456 (1974); *Burlington Truck Lines* v. *United States*, *supra* note 61, 371 U.S. at 168, 83 S.Ct. at 245, 9 L.Ed.2d at 215; *American Trucking Ass'ns* v. *ICC*, 656 F.2d 1115, 1125 (5th Cir. 1981).

[74] See *Black* v. *ICC*, *supra* note 1, 246 U.S.App.D.C. at 23, 762 F.2d at 117 (noting that the petitioner there had pointed

In the notice of rulemaking on the proposed exemption, the Commission stated that "[p]rior approval of abandonment of out of service rail lines does not appear to be necessary to carry out the goals of the rail transportation policy." [75] The Commission predicted that, rather, the exemption might well facilitate achievement of one of the policy objectives: expeditious decisionmaking when regulation is necessary and minimization of the need for federal regulatory control.[76] The notice also referred to cases in which the Commission had concluded that exemption of an abandonment from the statutory strictures would not affect the transportation policy because the involved rail service had been discontinued for several years.[77]

Comments submitted in response to the notice prompted the Commission to stand by its preliminary estimate that compliance with the statutory abandonment procedures is not necessary to carry out the goals of the rail transportation policy after the rail lines in question have gone out of service.[78] The Commission found support in the comments for its earlier view that the exemption would minimize the occasion for regulatory control and foster expeditious decisions when regulation is necessary.[79] The Commission also found that two additional policy objectives would be served: reduction of regulatory

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to no unconsidered factor that might possibly have rendered the Commission's conclusion to grant an exemption arbitrary and capricious under the circumstances of that case).

[75] *Exemption of Out of Service Rail Lines, supra* note 27, 47 Fed. Reg. at 13539.

[76] *Id.* (referring to 49 U.S.C. § 10101a(2) (1982)).

[77] 47 Fed. Reg. at 13538-13539 n.1.

[78] *Exemption of Out of Service Rail Lines, supra* note 1, 366 I.C.C. at 891.

[79] *Id.* at 892 (referring to 49 U.S.C. § 10101a(2) (1982)). Petitioner does not contest this finding.

barriers to entry into and exit from the industry,[80] and promotion of energy conservation.[81]

Petitioners assert that the findings on the two policy goals last mentioned are irrational, and that the Commission failed to take other relevant policy criteria into account.[82] We sustain the Commission's conclusion on barriers to entry and exit, but agree that the Commission did not adequately support its determination on energy conservation. We also agree that the Commission erred in failing to address other relevant aspects of the rail transportation policy.

A. *Facilitation of Entry and Exit*

Petitioners offer separate arguments against the finding that the exemption will facilitate entry to and exit from the rail industry. The Illinois petitioners contend that the Act contemplates exit from the industry as a whole, and not simply from the operation of a particular line.[83] Petitioner New York points to the unavailability of statutory forced sale of abandoned lines to potential new entrants[84] under the exemption, and urges that this offsets whatever exits the exemption might make easier.[85]

Neither of these arguments persuades us that the Commission's finding was irrational. While the Act may refer to exit from the industry as a whole, abandonment

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[80] *Id.* (referring to 49 U.S.C. § 10101a(7) (1982)).

[81] *Id.* (referring to 49 U.S.C. § 10101a(15) (1982)).

[82] Brief for Illinois Petitioners at 17; Reply Brief for Petitioner New York at 12.

[83] Brief for Illinois Petitioners at 17.

[84] See 49 U.S.C. § 10905 (1982); text *supra* at notes 16-23. In its decision, the Commission emphasized the inapplicability of this section to exempted abandonments. *Exemption of Out of Service Rail Lines, supra* note 1, 366 I.C.C. at 888.

[85] Brief for Petitioner New York at 13-15.

of a particular line lessens the railroad's presence and thus facilitates its complete withdrawal from the industry. The inference that a simpler process of achieving an abandonment lowers regulatory barriers to both entry and exit seems reasonable.

Nor does the demise of the forced-sale option in exempted abandonment of out-of-service lines render the Commission's determination arbitrary. The parties have focused on whether the opportunity to acquire an abandoned line at a forced sale is available to prospective purchasers when the line is out of service;[86] they do not consider whether elimination of the forced sale amounts to interposition of an obstacle. We need merely observe that removal of a mechanism that might facilitate entry into the industry, such as the forced sale, does not equate to erection of a regulatory barrier to entry. Nor does it dissipate the Commission's finding that the exemption will reduce the regulatory barriers to exit. At least overall, the Commission's outcome accords with the policy of deregulation pervading the Staggers Act.[87]

B. *Energy Conservation*

Petitioners also insist that the Commission's finding that the exemption will promote energy conservation is

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[86] See note 84 *supra*. Petitioner New York argues that elimination of the possibility of acquiring a rail line at a forced sale curtails opportunities for entry, and that this the Commission must balance against lowered barriers to exit. Brief for Petitioner New York at 14-15. The Commission emphasized that the opportunity for a free-market purchase of an abandoned line remains. *Exemption of Out of Service Rail Lines*, *supra* note 1, 366 I.C.C. at 888; see also Brief for Respondents at 15. Moreover, the Commission says, the purpose of the § 10905 forced sale is to preserve existing service and, of course, there is no service to be continued when a line is out of use. *Id.* at 16.

[87] See, e.g., 49 U.S.C. § 10101a(2) (1982). See also 49 U.S.C. § 10101a note (4), (9) (congressional declaration of findings).

without support in the record.[88] With this we thoroughly agree. Comments by the Commission's Section on Energy and Environment addressed only the question whether the Commission should condition resort to the exemption on compliance with environmental factors.[89] Neither this nor any other comment submitted to the Commission hints that the exemption will contribute to any conservation of energy.[90] A finding utterly lacking in record support is arbitrary.[91]

C. *Other Policy Objectives*

In addition to their attacks on specific findings by the Commission respecting the rail transportation policy, petitioners argue that other facets of the policy are relevant to propriety of the exemption but were not considered by the Commission. While, as we have said, the

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[88] Brief for Illinois Petitioners at 17.

[89] Comments of Section on Energy and Environment, Interstate Commerce Commission (filed Apr. 1, 1982), J. App. 224. In its decision adopting the exemption, the Commission accepted this suggestion, noting that it lacks authority to exempt transactions from compliance with energy and environmental statutes, *Exemption of Out of Service Rail Lines, supra* note 1, 366 I.C.C. at 890, and stating that it may at times condition availability of the exemption on compliance with environmental criteria. *Id.* at 890. The Illinois petitioners argue that this statement reflects an impermissible limitation on what they claim to be the Commission's ability to deny altogether an exemption because of environmental considerations. Brief for Illinois Petitioners at 27-28. We find nothing in the Commission's statement warranting that construction.

[90] Indeed, at least one comment strongly criticized any finding to this effect as one without basis in fact or law. See Comments of State of Illinois and Illinois Commerce Commission, *supra* note 47, at 7, J. App. 126.

[91] *American Trucking Ass'ns* v. *ICC*, *supra* note 73, 656 F.2d at 1125; see also *Bowman Transp.* v. *Arkansas-Best Freight Sys.*, *supra* note 73, 419 U.S. at 285, 95 S.Ct. at 442, 42 L.Ed.2d at 455-456.

Commission need not address every aspect of the policy,[92] it must make clear that it weighed each component that is pertinent.[93]

First, petitioners contend that abandonment of a line bearing overhead traffic will result in a rerouting of that traffic, which will seriously affect the reasonableness of the rates therefor in the absence of competition[94]—in contravention of the sixth objective of the rail transportation policy.[95] Several of the comments submitted anticipated such an adverse impact on rates.[96] The Commission asserts that the railroads need not exercise their option to use a short-line distance for purposes of rate-making, and thus may raise their rates even absent the exemption.[97] The short answer to this argument is that the rates as raised must nonetheless remain reasonable, and since one of the aims of the rail transportation policy is maintenance of reasonable rates where there is an absence of competition, the inquiry on appropriateness of the exemption should have extended to whether abandon-

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[92] See note 73 *supra*.

[93] See notes 71-74 *supra* and accompanying text.

[94] Brief for Illinois Petitioners at 17.

[95] See 49 U.S.C. § 10101a(6) (1982).

[96] See Comments of Georgia Public Service Commission, *supra* note 52, at 1, J. App. 21 (arguing that because rate structures are based on mileage, exemption will result in higher rates because of more circuitous routes); Comments of Montana Citizens Freight Rate Association, *supra* note 47, J. App. 13 (requesting that exemption not apply to situations where through rates will be disrupted); Comments of North Carolina Utilities Commission (filed May 4, 1982), J. App. 42 (anticipating that where rail rates are based on short-line mileage, abandonment of certain lines may result in higher rates).

[97] Brief for Respondents at 17.

ments of out-of-service lines will expose shippers to excessive rates.[98]

Despite its receipt of comments urging a connection between the proposed exemption and the level of rates, the Commission chose to remain silent on whether application of the statutory abandonment procedures is essential to maintenance of reasonable rates.[99] The exemption adopted by the Commission skirts the analysis of the public convenience and necessity that those procedures demand, including the focus on costs to shippers. The Commission should have determined whether adherence to the statutory procedures is necessary to achieve the goal of rate reasonableness set by the rail transportation policy.[100]

Petitioners further argue that the exemption contravenes the policy by not ensuring "the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national

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[98] See *Illinois* v. *United States*, 666 F.2d 1066, 1080 (7th Cir. 1981) (Commission must consider whether shippers relegated to alternative transportation can remain competitive); *Georgia Pub. Serv. Comm'n* v. *United States*, 704 F.2d 538, 545 (11th Cir. 1983) (in abandonment case, Commission must consider whether alternative transportation is economically feasible).

[99] Illinois petitioners assert that the effect the exemption has on rates also brings into play § 10101a(1), (3), (10), and (11) of the rail transportation policy. Brief for Illinois Petitioners at 17.

[100] This conclusion accords closely with our holding in *Brae Corp.* v. *United States*, *supra* note 62, 238 U.S.App.D.C. at 375-376, 740 F.2d at 1046-1047, that the Staggers Act's requirement that the Commission consider the need for continued regulation to further the rail transportation policy mandates study of the relationship between the statutory provisions ordinarily applicable and relevant facets of that policy. Like the statutory sections addressed in *Brae*, those concern-

defense." [101] Although this policy objective is plainly relevant to suitability of the exemption, and although comments received by the Commission clearly referred to considerations implicating its criteria,[102] the Commission's decision does not reflect adequate attention to them. The Commission now advances the twin non sequiturs that it discussed the alternative of acquiring an aban-

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ing abandonment were revised by Congress "at approximately the same time and as part of the same Act which contains both the transportation policy in § 10101a and the exemption authorization in § 10505a." *Id.* at 376, 740 F.2d at 1047.

[101] See 49 U.S.C. § 10101a(4) (1982).

[102] For example, the Department of Defense submitted comments on the exemption's implications for the national defense, asserting that advance notice of a railroad's intention to abandon a line, required by § 10904(e)(2), (3), is essential if the Department is to perform the task of estimating potential impacts of abandonments and taking steps to retain necessary rail capability. Comments of United States Department of Defense (filed Apr. 30, 1982) at 3, J. App. 65. The Department stated that it has a limited number of installations in standby or semi-active status that may not have used rail service for two or more years, but might require rail capability in a prolonged wartime effort. *Id.* at 4, J. App. 66. The Department suggested that "the exemption should provide for identification on the rail carrier's system diagram map for a four-month period prior to the line's being abandoned." *Id.* The Department also expressed the view that "the Commission should consider a shipper's request for implementation of financial assistance procedures as adequate justification for granting a petition for revocation." *Id.* at 5, J. App. 67. The Department expressly invoked the terms of § 10101a(4), *id.* at 1, J. App. 63, as did the Railroad Labor Executives' Association. Comments of Railroad Labor Executives' Association (filed Apr. 30, 1982) at 3, J. App. 112, 114. Subsequently, the exemption was amended to provide the Department of Defense with additional notice of intent to abandon, but the Department's remaining concerns and suggestions were not addressed. See *Exemption of Out of Service Rail Lines; Notice to the Department of Defense,* 50 Fed. Reg. 24649 (1985).

doned line through private negotiation or the feeder development program,[103] and that the primary commenter on the point, the Department of Defense, did not seek judicial review.[104] Not only are these post hoc rationalizations of counsel legally unacceptable,[105] but neither responds to the concerns expressed in the comments [106] nor constitutes due consideration of the impact of the exemption on this aspect of the rail transportation policy.

Finally, petitioners assert that the Commission should have considered whether application of the statutory system-diagram requirements [107] and utilization of the statutory financial-assistance programs [108] are necessary to meet the policy objective of cooperation "with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established" by the Act.[109] The Commission contends that this expression of policy concerns only

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[103] Brief for Respondents at 18. The Commission characterizes the Department of Defense's plea as one for "adequate opportunity to purchase abandoned rail lines that may be needed for national defense purposes." Brief for Respondents at 18. However, the Department's comments refer not only to the subsidiary issue of potential rescue of a to-be-abandoned line, but primarily to a need for "reasonable advance notice of potential abandonments . . . in order to have sufficient time to evaluate impact." Comments of United States Department of Defense, *supra* note 102, J. App. 63; see generally note 102 *supra*.

[104] Brief for Respondents at 18.

[105] *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto Ins. Co.*, *supra* note 63, 463 U.S. at 50, 103 S.Ct. at 2780, 77 L.Ed.2d at 462; *Brae Corp.* v. *United States*, *supra* note 62, 238 U.S.App.D.C. at 376, 740 F.2d at 1047.

[106] See notes 102-103 *supra*.

[107] See note 14 *supra* and accompanying text.

[108] See note 16 *supra* and accompanying text.

[109] See 49 U.S.C. § 10101a(9) (1982).

state regulation of intrastate rail operations, while the exemption will affect only lines that are part of the interstate rail system.[110] The Commission thus assumes that because the states would not regulate the lines exempted, application of the statutory abandonment procedures could not in any way promote cooperation with the states to assure exercises of intrastate regulatory jurisdiction consistent with the statutory standards.

It seems obvious, however, that any sort of cooperation with the states on transportation matters is calculated to increase the probability that the states will reciprocate by continuing to observe federal standards. More importantly, and contrary to the Commission's assertion, the rail transportation policy on cooperation with the states is not restricted "by its terms" to situations where the states are applying federal standards,[111] but extends unqualifiedly to "transportation matters." [112] We think the Commission should have considered the many comments submitted by the states decrying the lack of notice of proposed abandonments and the unavailability of forced sales under the exemption.[113] From aught that appears, the Commission paid no heed to these comments.

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[110] Brief for Respondents at 18. The Commission claims that the policy fostering cooperation with the states is intended only to assure that states will adhere to the rail transportation policy when they regulate intrastate transportation provided by carriers subject to Commission jurisdiction because of their interstate operation. *Id.* See 49 U.S.C. § 11501 (b) (1982). The Commission also contends that the purpose of the system diagram is to warn states in advance that lines considered burdensome by the carrier may become candidates for abandonment if greater traffic and revenue commitments are made, *id.* at 17, and that "[s]uch advance warning would not seem to be particularly necessary for out-of-service lines." *Id.* at 17-18.

[111] See Brief for Respondents at 18.

[112] See 49 U.S.C. § 10101a(9) (1982).

[113] See Comments of Delaware Department of Transportation (filed Apr. 21, 1982), J. App. 12; Comments of Georgia

The Commission's decision thus falls short of the treatment required by the first prong of Section 10505(a); it has not made all of the findings prerequisite to a determination that application of the statutory provisions on abandonment is unnecessary to carry out the rail transportation policy. The Commission did not support its conclusion, offered in support of the exemption, that the exemption would encourage and promote energy conservation.[114] Moreover, the Commission did not undertake findings in connection with other aspects of the policy that are relevant to the appropriateness of the exemption of out-of-service lines.[115] Accordingly, we must remand this case to the Commission for suitable findings in these respects.

III. Limited Scope and Protection From Abuse of Market Power

The second of the two phases of the Section 10505(a) analysis is an additional prerequisite to an exemption from operation of a provision of the Staggers Act. This requirement is cast in the alternative: either the transaction or service to be exempted must be of limited scope,[116] or application of the statutory provision must be unnecessary to protect shippers from abuses of market power.[117] The Commission found that the scope of the

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Public Service Commission, *supra* note 52, J. App. 21-22; Comments of Kansas Department of Transportation, *supra* note 51, at 4, J. App. 169; Comments of Maryland State Railroad Administration, *supra* note 52, at 4, J. App. 60; Comments of North Carolina Utilities Commission, *supra* note 96, J. App. 42; Comments of Commonwealth of Virginia (filed Apr. 14, 1982), J. App. 9.

[114] See text *supra* at note 89.

[115] See text *supra* at notes 95-113.

[116] 49 U.S.C. § 10505(a)(2)(A) (1982), quoted *supra* note 26.

[117] *Id.* § 10505(a)(2)(B), quoted *supra* note 26.

exemption will be limited because abandonment of lines out of service for at least two years "has no competitive or operational impact, because it will usually pertain to short-line segments with no shippers." [118] The Commission further found that two years of nonuse of a line proves that regulation is not needed to safeguard shippers against market-power abuses.[119]

The Illinois petitioners launch two principal attacks on the Commission's response to this mandate. They first contend that the two-year period during which a line must be out of service before it can qualify for the exemption is too brief to assure against abuses of market power to the detriment of shippers.[120] We uphold the Commission in this regard. They also argue that the Commission erred in failing to assess the effect of its change in definition of "out of service line" [121] on the issues of limited scope and market-power abuse. We agree on this point and accordingly direct the Commission to reexamine those issues on remand.

A. *The Two-Year Period*

The Illinois petitioners assert that the Commission acted arbitrarily when it determined that two years is long enough for a line to be out of service to assure that no subterfuge lurked behind the discontinuance of service.[122] In its notice of rulemaking, the Commission had

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[118] *Exemption of Out of Service Rail Lines, supra* note 1, 366 I.C.C. at 892.

[119] *Id.*

[120] Of course, a showing that the exemption might not protect against abuses of market power would not preclude exemption if the Commission could properly find that the exemption transaction is of limited scope.

[121] See note 58 *supra* and accompanying text.

[122] Brief for Illinois Petitioners at 20-21. The question of subterfuge relates closely to the aspects of the rail transporta-

indicated satisfaction that the two-year period would suffice for that purpose. The notice cited decisions in which the Commission, in granting case-by-case exemptions, had found that since no traffic had been handled on the involved lines for several years, there was no evident need for the lines, and consequently that abandonment would not adversely affect shippers.[123] Moreover, the Commission declared, abandonments of this sort are so limited in scope that they usually exert "no impact on interstate commerce," [124] but merely "allow[] the rail carrier to dispose of track and land for lines that [have] not been operated or maintained for many years." [125]

As the Illinois petitioners observe,[126] the decisions referred to in the Commission's notice of rulemaking dealt with lines that had been out of service for much longer than two years.[127] These petitioners further argue that

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tion policy specified in 49 U.S.C. § 10101a(4), (6), (10) (1982), quoted *supra* note 67.

[123] *Exemption of Out of Service Rail Lines, supra* note 27, 47 Fed. Reg. 13538-13539. See also note 127 *infra*.

[124] *Exemption of Out of Service Rail Lines, supra* note 27, 47 Fed. Reg. at 13539.

[125] *Id.*

[126] Brief for Illinois Petitioners at 19-20.

[127] As we have mentioned, see notes 28-29 *supra*, in these decisions the Commission had granted exemptions enabling abandonments of lines that had lain out of service for from ten to twenty-four years. Furthermore, in one of these decisions, the Commission based its finding of limited scope on the fact that the unused track segment was at the end of a branch line, *Atchinson, T. & S.F. Ry., supra* note 29, J. App. 106; in another, the Commission premised its finding of limited scope not only on an eleven-year absence of traffic on the line but also on the ground that it was only a short-line segment for which no need existed, with the result that no shippers would be adversely affected by its abandonment, *Burlington N. R.R., supra* note 29, J. App. 110; and in still

additional cases upon which the Commission relied in its decision do not support the two-year period.[128]

The Commission's decision refers to only one instance antedating issuance of the notice of rulemaking in which a line out of service for less than two years had been exempted from the statutory abandonment procedures.[129] The Commission adverted to three other exemptions, granted after promulgation of the notice, involving lines that had been out of service for periods ranging from two to five years.[130] We agree that the examples cited in the notice and the decision, standing alone, do not fully establish that a blanket exception of lines out of service for as little as two years is necessarily accompanied by a reasonable assurance that shippers are shielded from abuses of market power.

The Commission, however, did not rest merely upon its prior exemption adjudications; it responded to concerns about this potential danger in several additional and more positive ways. To augment the safeguards provided by existing statutory complaint procedures,[131] the

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another of the decisions, the Commission's finding of limited scope rested not only on the fact that the line had not handled any traffic for twenty-four years but also on the fact that the abandonment was limited to a short-time segment. *Louisville & N. R.R., supra* note 29, J. App. 108.

[128] Brief for Illinois Petitioners at 20.

[129] See *Exemption of Out of Service Rail Lines, supra* note 1, 366 I.C.C. at 886 n.4. The exempted line had not been used for a year and a half and the Commission granted the exemption less than a month before it issued its notice of rulemaking in this case. *Id.*

[130] *Id.* The Illinois petitioners assert that the grants of these three exemptions were self-serving because they postdated proposal of the two-year rule. Brief for Illinois Petitioners at 20.

[131] See 49 U.S.C. § 11702(a)(1) (1982) (empowering the Commission to bring civil injunction suits against railroads allegedly violating §§ 10901-10907).

Commission amended its exempting regulation to make the exemption unavailable for any line targeted in a formal complaint before the Commission that either is filed within the two-year out-of-service period or is awaiting decision when an exemption is sought.[132] Later, when the Commission considered petitions to reconsider its rulemaking decision,[133] it extended ineligibility for the exemption to include lines subject to state or local government complaints to the Commission.[134] Even more recently, the Commission broadened the prohibition on exemptions to encompass lines complained of in federal district courts.[135] In light of these strictures, and the Commission's apparent willingness to monitor for and rectify post-exemption market-power abuses,[136] we cannot upset the Commission's judgment that the two-year period of out-of-service status affords sufficient protection to shippers.[137]

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[132] *Exemption of Out of Service Rail Lines, supra* note 1, 366 I.C.C. at 888. See 49 C.F.R. pt. 1111 (1985) (complaint and investigative procedures). The railroad seeking the exemption must certify that no shipper has filed such a complaint within the two-year period. 49 C.F.R. § 1152.50(b) (1985).

[133] See 49 C.F.R. § 1110.10 (1985).

[134] *Exemption of Out of Service Rail Lines* (Dec. 27, 1983) (decision on reconsideration) at 3.

[135] *Exemption of Out of Service Lines, supra* note 58, 50 Fed. Reg. at 8335; see note 48 *supra*.

[136] See H.R. Rep. No. 1430 (Conf.), 96th Cong., 2d Sess. 105 (1980) (articulating Conference Committee's expectation that Commission will adopt policy of reviewing carrier actions after the fact to correct abuses of market power).

[137] See *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 596, 101 S.Ct. 1266, 1275, 67 L.Ed.2d 521, 535 (1981); *Telelocator Network* v. *FCC*, 223 U.S.App.D.C. 336, 349, 691 F.2d 525, 538 (1982); *Shell Oil Co.* v. *FPC*, 520 F.2d 1061, 1071 (5th Cir. 1975), *cert. denied*, 426 U.S. 941, 96 S.Ct. 2660, 49 L.Ed.2d 394 (1976).

B. *Definition of "Out-of-Service Line"*

The exemption that the Commission ultimately adopted departed in an important respect from the one it originally proposed. In its decision, the Commission enlarged the definition of "out-of-service line" from a line carrying no traffic at all to include additionally a line over which overhead traffic travels.[138] The Commission neglected, however, to assess the adequacy of its findings to support the exemption as correspondingly enlarged, and thereby greviously erred.

In its notice of rulemaking, the Commission stated its belief that the exemption—then envisioned for a line devoid for two years of any traffic at all—would have no operational impact and thus would be limited in scope, and would not affect shippers because none would have used the line for at least two years.[139] In its decision, however, the Commission, notwithstanding expansion of its definition to also take in lines conducting overhead traffic only, reiterated the same rationale:

> Several parties question whether this exemption is of limited scope. However, they present no factual data to refute our finding based on analysis of prior exemptions, that abandonment of lines out of service for at least 2 years has no competitive or operational impact, because it will usually pertain to short-line segments with no shippers. Further, regulation is not needed to protect shippers from the abuse of

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[138] The notice of rulemaking had specifically requested comments on this potential change, *Exemption of Out of Service Rail Lines, supra* note 27, 47 Fed. Reg. at 13539, which shippers had vigorously opposed. See Comments of Growmark, Inc., *supra* note 35, at 11, J. App. 154; Supplement to Comments of Illinois Commerce Commission, *supra* note 47, at 2, J. App. 178; Comments of Kansas Department of Transportation, *supra* note 51, at 3, J. App. 168; Comments of Montana Public Service Commission, *supra* note 47, at 4, J. App. 160.

[139] See *Exemption of Out of Service Rail Lines, supra* note 27, 47 Fed. Reg. at 13539.

> market power, because the lines have been out of service for at least 2 years.[140]

This explanation lends no support whatsoever to the exemption insofar as it pertains to lines accommodating overhead traffic; on the contrary, it exposes the decisional flaw attributable to the definitional change. Such lines are not "segments with no shippers," nor have they been "out of service for shippers" whose shipments comprise the overhead traffic. Nor is it true that the exemption "would merely allow carriers to dispose of track and land for lines that had not been operated or maintained," as the Commission was later to say.[141] The lines obviously have been operated for overhead traffic and presumably have been maintained for that purpose. Resultantly, it does not automatically follow that an exemption of these lines from the statutory abandonment procedures "is of limited scope" or without any "competitive or operational effect," requiring no "regulation . . . to protect shippers from the abuse of market power." The number of affected overhead shippers in a given situation may conceivably be vast rather than trivial, and they may be susceptible rather than immune to "competitive or operational impact" and "abuse of market power." The Commission's rationale simply does not sustain the exemption for overhead lines.

In expanding the definition to encompass lines over which only overhead traffic moves, the Commission declared that assignment of "overhead traffic [to] a given route [is] a matter of business efficiency . . ., to better use crews, equipment and maintenance of the line. . . . Overhead traffic routing is a matter of managerial discretion and is not of controlling importance in most abandonment proceedings." [142] We first note that whether

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[140] *Exemption of Out of Service Rail Lines, supra* note 1, 366 I.C.C. at 892.

[141] *Id.* at 885.

[142] *Id.* at 887.

overhead routing is a prerogative of railroad management is irrelevant to the Section 10505(a)(2) inquiries, which relate to the scope of the transaction exempted and the danger of abuses of market power.[143] Nor does the fact that, in a statutory abandonment proceeding, the determination on the public convenience and necessity may accord little weight to overhead traffic on the line obviate the need, in the Commission's evaluation of the proposed exemption under Section 10505(a)(2), to take into account and justify the greater breadth of the exemption wrought by the expansion of the concept of "out of service." Section 10505(a)(2) demands exploration, not into the public convenience and necessity, but into the scope of the transaction to be exempted and the potential for abuses of market power. The much broader definition of "out of service" upon which the Commission eventually settled implicates and exacerbates both of these concerns.[144]

While the Commission permissibly drew upon its prior exemption decisions for part of its justification for the two-year period of nonuse of the line,[145] it erred in relying upon prior abandonment proceedings as support for the conclusion that the "out-of-service" definition was appropriate. The analysis dictated by Section 10505(a)(2) for exemptions, we repeat, differs radically from the assessment of the public convenience and necessity statutorily mandated for abandonments. We hold that Section 10505(a)(2) required the Commission to reevaluate the impact of the exemption once it was extended to lines over which overhead traffic is traveling and from which an abandonment would necessitate rerouting of the traffic to some other line or lines. Lacking that, the Commis-

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[143] See text *supra* at notes 116-117.

[144] See Comments of Growmark, Inc., *supra* note 35, at 11, J. App. 154; Comments of Montana Public Service Commission, *supra* note 47, at 4, J. App. 160.

[145] See Part III(A) *supra*.

sion has failed to articulate a reasoned explanation for its action.[146]

IV. Protection of Employee Interests

Section 10505(g) provides that the Commission may not exercise its exemption authority to relieve a carrier of its obligation to protect the interests of employees.[147] The exemption regulation under scrutiny in terms requires only that railroads seeking exemption include with their notices of intent to abandon information on the level of labor protection to be provided.[148] However, the notice of rulemaking indicated that the standard labor conditions adopted by the Commission in *Oregon Short Line Rail Co.—Abandonment—Goshen*[149] would apply to carriers utilizing the exemption,[150] and the Commission's decision acknowledges that it adopted the exemption as proposed in the notice of rulemaking with only specified changes.[151] The Commission does not dispute the resulting conclusion that the exemption thus incorporates the *Oregon Short Line* employee protections.

The Illinois petitioners contend, quite correctly,[152] that those protections constitute only a minimum that the

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[146] See *Brae Corp.* v. *United States*, *supra* note 62, 238 U.S. App.D.C. at 367, 740 F.2d at 1038; *American Trucking Ass'ns* v. *ICC*, *supra* note 73, 656 F.2d at 1125; see also *Bowman Transp.* v. *Arkansas-Best Freight Sys.*, *supra* note 73, 419 U.S. at 285, 95 S.Ct. at 442, 42 L.Ed.2d at 455-456.

[147] 49 U.S.C. § 10505(g) (1982), quoted *supra* note 26.

[148] See 49 C.F.R. § 1152.50(d)(2) (1985).

[149] 360 I.C.C. 91, 93-96, 98-103 (1979).

[150] *Exemption of Out of Service Rail Lines*, *supra* note 27, 47 Fed. Reg. at 13540 (1982).

[151] *Exemption of Out of Service Rail Lines*, *supra* note 1, 366 I.C.C. at 885.

[152] See *Railway Labor Executives' Ass'n* v. *United States*, 219 U.S.App.D.C. 23, 31, 675 F.2d 1248, 1256 (1982).

Commission must expand if the circumstances so require.[153] They assert that the exemption regulation does not provide any adequate procedure by which labor can obtain Commission consideration of arguments that a particular case warrants a higher level of protection.[154]

It seems that use of either of two possible vehicles might summon the Commission to address a labor-protection issue. One is a petition for reconsideration of a Commission decision, which would ensure a determination of the issue prior to effectuation of an abandonment; the other is a petition for revocation of an exemption, which would not afford that guaranty. The parties are in hopeless disagreement on actual availability of those mechanisms,[155] and a chameleon-like stance of the Com-

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[153] Brief for Illinois Petitioners at 26; Reply Brief for Illinois Petitioners at 10.

[154] Brief for Illinois Petitioners at 26-27.

[155] The regulation spawning this dispute provides in relevant part:

> Petitions to stay the effective date of the exemption must be filed within 10 days after publication and petitions for reconsideration must be filed within 20 days after publication. The exemption will be effective 30 days after publication (unless stayed pending reconsideration). If the notice of exemption contains false or misleading information, the use of the exemption is void *ab initio* and the Commission shall summarily reject the exemption notice.

49 C.F.R. § 1152.50(d)(3)(1985). The Illinois petitioners claim that a petition for reconsideration is available under this regulation only when a railroad is alleged to have incorporated false or misleading information into its notice of exemption, Reply Brief for Illinois Petitioners at 4-5, and contend that labor therefore must rely on revocation procedures. Brief for Illinois Petitioners at 27. The Commission has changed its position on this issue several times in the interim between its decision and submission of this case for decision by this court. Initially, the Commission indicated that availability of petitions for reconsideration would make petitions for revocation unnecessary. *Exemption of Out of Service Rail*

mission on the question [156] makes any present effort toward its resolution a risky if not a fruitless undertaking.[157]

In this state of grave uncertainty as to a procedure available to challenge the sufficiency of the *Oregon Short Line* protections, we cannot at this juncture address the issue of its adequacy. Instead, we direct the Commission to ascertain, on remand, the procedure that will assure ample consideration of the employee-protection issue and to clarify the manner in which employee may invoke it.

V. Conclusion

The Staggers Act greatly enlarged the authority of the Commission to exempt railroads from regulation. Accompanying the power thus entrusted, however, are

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Lines, *supra* note 1, 366 I.C.C. at 890. When petitioners sought to reopen the proceeding, however, the Commission stated that reconsideration and revocation procedures would be appropriate. *Exemption of Out of Service Rail Lines*, *supra* note 134, at 2. The Commission's brief informed us that a petition for reconsideration would command Commission examination of the protection issue, Brief for Respondents at 23, but at oral argument Commission counsel took the position that a petition for reconsideration can be utilized only if the Commission finds that certification of the abandonment was improper—presumably because the factual predicates are absent.

[156] See note 155 *supra*.

[157] We may, however, dispose of one argument. The Illinois petitioners assert that relegation of the issue of adequacy of employee protections to post-abandonment revocation procedures would violate an administrative rule that the Commission must establish the level of employee protection before consummation of an abandonment. Reply Brief for Illinois Petitioners at 10. The case cited for this proposition does not, however, impose any requirement that consideration of this problem precede actual abandonment. See *Railway Labor Executives' Ass'n* v. *United States*, *supra note* 152, 219 U.S. App.D.C. at 31, 675 F.2d at 1256.

duties that the Commission must scrupulously perform in the course of any decision to create an exemption. Undoubtedly the Commission has endeavored to fulfill these responsibilities, but it did not complete the exacting analytical process indispensable to a soundly reasoned decision. The Commission failed adequately to consider whether the challenged exemption would thwart relevant aspects of the rail transportation policy; it assigned a new definition to "out-of-service lines" without ascertaining whether it was sufficiently supported by its findings; and it has yet to show that it affords affected employees of abandoned rail lines a fair opportunity to voice their concerns respecting protective labor conditions. To the end that these shortcomings may be rectified, we vacate the order under review and remand the case to the Commission for further proceedings consistent with this opinion.

So ordered.

APPENDIX E

INTERSTATE COMMERCE COMMISSION

EX PARTE NO 274 (SUB-NO 8)

EXEMPTION OF OUT OF SERVICE RAIL LINES

Decided June 3, 1983

The Commission is exempting abandonments under 49 U.S.C. 10903-10905 from the requirements of prior approval where the lines have been out of service for at least 2 years, subject to certain conditions and standard labor protection provisions.

DECISION

BY THE COMMISSION

This proceeding was instituted on the Commission's own motion by a notice of proposed exemption and request for comments (NPE) served March 24, 1982, and published in the Federal Register on March 31, 1982, at 47 F.R. 13538-39.

The proposal would exempt the abandonment of rail lines that have been out of service for at least 2 years from the provisions of 49 U.S.C. 10903-10905 on the grounds that where a rail line has been out of service for several years, abandonment of the line would promote the goals of the rail transportation policy and would (1) have no impact on interstate commerce; (2) have no competitive or operational impact; and (3) be of limited scope because it would merely allow carriers to dispose of track and land for lines that had not been operated or maintained for at least 2 years.

We have received 44 comments on this proposal (the parties are listed in appendix A). Generally, the exemption was supported by the commenting railroads. Shippers, trade associations, States, and others, on the other hand, either opposed the proposal or raised arguments about the notice procedures and the abuses which might occur if the exemption is allowed. Several parties challenged the statutory findings supporting a grant of this class exemption. We are adopting the NPE with changes to alleviate problems raised in the comments.

DISCUSSION

Jurisdiction.—Certain parties argue that we do not have jurisdiction to exempt a *class* of transactions because 49 U.S.C. 10505 provides that we

may exempt a "class of persons, or *a* transaction or service" [emphasis added]. The scope and meaning of the wording in the statute was discussed thoroughly in *Railroad Consolidation Procedures*, 363 I.C.C. 200, 202-4 (1980). The original form of this statutory provision used the word "transactions,"[1] and when this provision was recodified,[2] the term "transactions" was changed to "a transaction." However, the clear intent was to recodify the Interstate Commerce Act without substantive change. *Id.* at p. 202. In addition, *Railroad Consolidation Procedures* cites legislative history which supports our interpretation. Based upon the clear legislative history of our exemption power, the precise wording of the prior statute, and the lack of substantive change in the recodification of the Interstate Commerce Act, we are authorized to exempt a class of transactions.

Out of service lines.—The two major issues raised involving out of service lines are how long should they be out of service and the exact meaning of out of service.

A. Time out of service.

Some of the parties commenting note that the cases cited in the NPE involved lines which were out of service for substantially longer periods than 2 years, and argue that a longer period is appropriate.[3] Although their analysis of prior cases is correct, we have also approved a number of exemptions where the line has been out of service for shorter periods than those cited in the NPE.[4] In these cases we relied on the same reasoning as in the exemptions cited in the NPE. The parties commenting have not demonstrated that different considerations are warranted in assessing lines out of service for at least 2 years and those out of service for a longer time.

We have balanced the interests of all parties involved. A 2-year period is long enough to show that no subterfuge is involved and to allow shippers time to induce a resumption of service through negotiations or legal action. A longer period would impose opportunity costs on the railroad without any overriding public benefits. We conclude, that the require-

[1] Section 207 of the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210 (February 5, 1976) (4R Act), amended section 12 of the Interstate Commerce Act.

[2] Revised Interstate Commerce Act, Public Law 95-473 (October 13, 1978), 49 U.S.C. Subtitle IV.

[3] These time periods include 7 years—R.I.F.A., 4 years—WMPSC, 5 years—NHPUC and WADOT.

[4] Finance Docket No. 29818, *Illinois Central Gulf Railroad Company—Abandonment In Addison, DuPage County, IL—Exemption Under 49 U.S.C. 10505 From 49 U.S.C. 10903* (not printed), served February 22, 1982 (1 1/2 years); Finance Docket No. 29868, *Burlington Northern Railroad Company—Exemption—Abandonment in West Duluth, MN* (not printed), served March 26, 1982 (5 years); Finance Docket No. 29924, *Union Pacific Railroad Company and Oregon Short Line Railroad Company—Abandonment and Discontinuance at Malad, ID—Exemption* (not printed), served June 8, 1982 (2 years); and Finance Docket No. 29892, *Burlington Northern Railroad Company, Extension—Abandonment Between Orting and Lake Kapowsin, WA* (not printed), served April 29, 1982 (3 years).

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ment that a line be out of service for at least 2 years is appropriate for this exemption.

B. Definition of out of service.

In the NPF we suggested that comments be filed on whether the definition of out of service should include overhead traffic. We conclude that out of service lines include those lines where there may still be overhead traffic, so long as there has been no traffic originating or terminating on the line for at least 2 years. A carrier may route overhead traffic on a given route as a matter of business efficiency, for example, to better use crews, equipment and maintenance of the line. Overhead traffic routing is a matter of managerial discretion and is not of controlling importance in most abandonment proceedings. Further, shippers of overhead traffic should not be affected, because they will continue to receive railroad service.

The greatest concern voiced in the comments is that railroads may abuse the use of embargoes (based on service or rates) to enable them to use this exemption for lines where there is a continuing transportation interest. Some fear that a carrier may embargo a line, make repairs so slowly that 2 years pass without service, and then seek to abandon the line under this exemption.

An embargo is issued by a carrier, and justifies a cessation or limitation of service as a temporary measure, when for some reason,[5] the carrier is unable to perform its duty as a common carrier. *I.C.C.* v. *Chicago, Rock Island and Pac. R. R.*, 501 F. 2d 908, 911 (8th Cir. 1974). The Association of American Railroads has issued procedures for the proper use of embargoes. See *Official Railway Equipment Register*, volume 97, No. 4, p. 1509, rules effective July 1, 1981. Embargoes are not, however, to be used as a permanent measure to route or control traffic. A rail carrier using the embargo procedure in an improper fashion is subject to the Commission's complaint procedures. In addition, under its common carrier obligation, a railroad's primary responsibility is to restore safe and adequate car service within a reasonable period of time. If service is curtailed beyond a reasonable period of time, it could be construed as an illegal abandonment and subject to injunctive procedures under 49 U.S.C. 11702(a)(1).

As an additional matter, some parties indicate that when a line is embargoed the rail carrier may provide alternate transportation, maintaining identical rates to that which would have been charged if the line were operable. The question is whether, in those circumstances, the line is considered to be out of service. Although the rates for shippers on the

[5] One reason would be a physical break in a line which cannot be repaired immediately (for example, a washout of a bridge or a portion of track).

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line who receive alternate service from the carrier are based on the rates which would apply if the line were open, nevertheless the line itself has not been physically used, and will be considered out of service for purposes of this exemption.

Several parties also contend that service and rate impediments may be used by carriers to force traffic off certain lines. It is argued that a railroad may use inefficient or dilatory car supply or surcharges under 49 U.S.C. 10705a(a)-(b) to control traffic patterns. The Interstate Commerce Act and common law impose duties upon common carriers to provide and furnish transportation upon reasonable request and to furnish safe and adequate car supply. (49 U.S.C. 11121). The refusal of a railroad to abide by the statute may warrant the filing of a complaint objecting to its action.[6]

Moreover, this class exemption may not be used if a formal complaint (49 CFR part 1111), is either pending with the Commission or has been decided in favor of the complainant within the 2-year period that a line has been out of service. The complaint must allege that the carrier imposed an illegal embargo or impediment to service on that line. We will require all carriers seeking to avail themselves of the exemption to certify in their notice that no complaint filed by a shipper during the 2-year out of service period is either still pending or was decided in the shipper's favor.

Financial assistance.—Several parties argue that the proposed exemption should not apply to the financial assistance provisions of 49 U.S.C. 10905 for continued rail service. They contend that the absence of service on a rail line is not always dispositive of the line's usefulness. It is argued that certain lines which were out of service due to poor track conditions, and where service was not reestablished due to inadequate revenue, may nevertheless provide a unique opportunity for a short-line or other railroad.

Section 10905(d)(1) provides that the Commission may postpone the issuance of a certificate authorizing abandonment where an offer of financial assistance has been made to continue rail service on the line. However, where there is an exemption, there has been (1) no finding under 49 U.S.C. 10903 that the public convenience or necessity requires or permits abandonment, (2) no publication of that finding, and (3) no certificate issued. Thus, section 10905 is inapplicable by its own provisions.

[6]However, carriers do have the right to file branch line surcharges under 49 U.S.C. 10705a(b)(1). The Commission will reduce or disallow a surcharge only if a shipper demonstrates that it exceeds a particular level. Thus application of a surcharge will not prevent a carrier from taking advantage of this exemption. See *Mississippi Public Service Comm'n* v. *I.C.C.*, 662 F. 2d 314 (5th Cir. 1981), and *Michigan Packaging Corporation* v. *I.C.C.*, 665 F. 2d 1045 (6th Cir. 1981). But see *I.C.C.* v. *City of Cherokee*, 671 F. 2d 1080 (8th Cir. 1982), where the court found that a surcharge was imposed for the improper purpose of avoiding a court remand for further consideration by the Commission.

Notwithstanding the inapplicability of section 10905, in the unlikely event that a line which has been out of service for 2 years will be the subject of purchase or subsidy offers, a party interested in acquiring the line could still do so through private negotiation after the exemption becomes effective. Also, a party interested in acquiring a line through Commission procedures could do so during the 2 years the line is out of service pursuant to the provisions of 49 U.S.C. 10910, the feeder development program.[7] The filing of an exemption may not be used to circumvent a legitimate pending feeder line application as the very existence of the application indicates a continuing interest in the line.

Procedure.—The NPE proposed that a notice be served on the State Public Service Commission (PSC) (or equivalent agency) in States where the line is located prior to filing a notice with this Commission. This notice would be filed with the Commission at least 7 days before the abandonment occurred. Several parties seek an extended notice and publication requirement, and a longer time period for responding to the notice.

We are changing the procedures proposed in the NPE to make them similar to procedures used presently in individual exemptions. These procedures are expedited, yet ensure that objections can be properly considered. The procedures will require: (1) notice to the State PSC (or equivalent agency) 10 days prior to filing a notice with the Commission; (2) publication of the notice of exemption in the Federal Register within 20 days of filing with the Commission; (3) filing of stay requests within 10 days after publication and petitions for reconsideraion within 20 days after publication; (4) exemption in effect 30 days after publication (unless stayed pending reconsideration).

This procedure expands the time to file an objection to the notice. However, the parties have not provided sufficient justification for the added delay and expense which would result from expanding the notice and publication requirements. This class exemption is intended to provide a simple, expedited procedure for railroads to remove track over lines that have not been operated for years. In almost all instances, these would be noncontroversial, unopposed abandonments. These procedures meet the notice and publication needs of this class exemption.

Rejection and revocation.—The NPE provided that petitions for revocation of the exemption, as applied to an individual line, must be filed within 20 days after notice of the exemption appeared in the Federal

[7] A party acquiring a line under the feeder program has certain benefits not available under section 10905, including (1) the right to elect exemption from title 49 with the exception of the joint rate provisions and (2) the ability to have the Commission require trackage rights and joint rates in certain circumstances. Since the sale price should be the same under both programs it appears that no one is harmed by disallowing the use of section 10905 for lines falling within the scope of this exemption.

Register. However, as discussed above, we have modified these procedures and will delay the effective date of the exemption to allow for stay petitions and petitions for reconsideration. Accordingly, a provision for petitions for revocation is no longer needed.

A carrier seeking to use this exemption must certify that there has neither been service over the line nor a complaint filed by a shipper that is pending or has been decided against the carrier involving the line for at least 2 years. If the notice of exemption filed by the carrier is found to contain false or misleading information as to these factors, the Commission will reject the notice, and this exemption cannot be used.

Other matters.—The parties have raised some specific questions relating to the use of this exemption and its impact on other statutes.

We have been asked to clarify the relation between this exemption and section 1156 of the Northeast Rail Service Act of 1981 (NERSA), Public Law 97-35, which amends section 308 of the Regional Rail Reorganization Act of 1973 (3R Act). NERSA provides that Conrail abandonments are *not* subject to the provisions of 49 U.S.C. chapter 109.[8] Accordingly, we cannot exempt Conrail from the requirements of NERSA under 49 U.S.C. 10505.[9] Similarly, this exemption does not apply to abandonments by bankrupt railroads, because those abandonments are governed by 11 U.S.C. 1170. In conclusion, our exemption power is limited to exempting rail carriers from provisions of 49 U.S.C. Subtitle IV and cannot be used to exempt carriers from the provisions of other statutes. See 49 U.S.C. 10505(a).

Further, 49 U.S.C. 10505 cannot exempt compliance with relevant energy and environmental acts.[10] Even though the rail lines for which this exemption is used will have been out of service for at least 2 years, the track removal and disposition of right-of-way may have environmental consequences. For example, it may affect historic structures or an endangered species. Accordingly, use of this notice procedure may at times be conditioned upon compliance with environmental conditions. In the NPE we also noted that we will not abrogate our responsibility to determine whether the right-of-way is suitable for other public purposes under 49 U.S.C. 10906. We had proposed that interested parties submit evidence contributing to this finding within 15 days from the date the notice appeared in the Federal Register. In light of the above modifica-

[8] See *Conrail Abandonments Under NERSA*, 365 I.C.C. 472, at 472.

[9] In order to take advantage of the NERSA abandonment provisions, Conrail must file a Notice of Insufficient Revenues for a line by November 1, 1983. Thereafter Conrail abandonments will not be governed by NERSA and it will be able to take advantage of this exemption.

[10] National Environmental Policy Act of 1969; National Historic Preservation Act; Endangered Species Act; Coastal Zone Management Act; et al.

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tions in the procedures, we will require that information on environmental consequences and public use be submitted within the 20-day period for filing petitions for reconsideration. A notice to the parties will be issued if environmental or public use conditions are imposed.

We also conclude that only the railroad owning the line may use this exemption. Finally, this class exemption does not relieve a carrier of its statutory obligation to protect the interests of employees. 49 U.S.C. 10505(g)(2) and 10903(b)(2).

Effective date of rule.—Some parties contend that this class exemption should not be used until 2 years after issuance of this decision. The result would be that lines that may have been out of service for a great number of years still could not be abandoned based upon the instant exemption until an additional 2-year period had run.

We have used the same balancing test here that we used in determining that a 2-year period is appropriate, and see no reason to postpone the positive benefits of this proposal, and to require railroads to wait an additional 2 years would not be in the public interest. Because of the strong interest expressed in the use of this proposal by all parties, notices of exemption under this rulemaking will be accepted upon this decision's taking effect.

Notice of proposed exemption to consider discontinuance and trackage rights.—The type of regulation governing the discontinuance of rail service and of trackage rights parallels that applicable to abandonments. Indeed, all three are covered by the same statutory and regulatory provisions. In a discontinuance of rail service, a carrier seeks to be relieved of its service obligation only, and does not seek to abandon track, while in a discontinuance of trackage rights, a carrier seeks to be relieved of its obligation to provide service over a line of another carrier arising from a trackage rights agreement.

Thus, in Ex Parte No. 274 (Sub-No. 8A), *Exemption of Out of Service Rail Lines (Discontinuance of Service and Trackage Rights)*, we will propose to expand this exemption to discontinuance situations. Notice will be published in the Federal Register soliciting comments for the described exemption. Upon receipt of the comments, we will review them and determine whether the exemption is warranted.

CONCLUSION

An analysis of the comments filed confirms our preliminary conclusions that prior approval of the abandonment of rail lines that have been out of service for at least 2 years is not necessary to carry out the goals of the rail transportation policy in section 10101a. Exemption will facilitate

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policy objectives, including minimizing the need for regulatory control and requiring expeditious decisions when regulation is required. It will also reduce regulatory barriers to exit from the industry, and encourage and promote energy conservation.

Several parties question whether this exemption is of limited scope. However, they present no factual data to refute our finding based on analysis of prior exemptions, that abandonment of lines out of service for at least 2 years has no competitive or operational impact, because it will usually pertain to short-line segments with no shippers. Further, regulation is not needed to protect shippers from the abuse of market power, because the lines have been out of service for at least 2 years.

The parties in favor of this exemption point out the substantial cost savings to be gained from this proposal. For example, because a carrier would no longer have an obligation to maintain the line, valuable rail assets could be used elsewhere in the carrier's system. Abandonment procedures under 49 U.S.C. 10903 *et seq.* involve a less than optimum use of resources where, as here, only rarely would there be a public need or interest in continued transportation service over the line.

In conclusion, the parties raised no arguments which would require a change in our findings supporting this exemption.

This action is taken under the authority of 49 U.S.C. 10321 and 10505, and 5 U.S.C. 553.

The Secretary (see 49 CFR 1011.7(h)) has certified that this section (which will benefit railroads through a relaxation of regulation) will not have a significant economic impact on a substantial number of small entities. Because the lines at issue will not have been used for at least 2 years, small business entities that would be served by the lines either were not dependent on that rail service or have made other arrangements for service.

This proceeding does not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The Commission exempts from the requirements of 49 U.S.C. 10903-10905 the abandonment of rail lines that have been out of service for at least 2 years.

2. Part 1152 of Title 49 of the Code of Federal Regulations is amended in conformance with appendix B to this decision.

3. This decision is effective on August 16, 1983.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre, and Gradison.

(SEAL)

AGATHA L. MERGENOVICH,
Secretary.

APPENDIX B

Revisions to the Code of Federal Regulations

PART 1152

49 CFR 1152 is amended as follows:

Part 1152 is amended by adding a new subpart F to read as follows:

Subpart F—Exempt abandonments

1152.50 Exempt Abandonments

(a) A proposed abandonment of a railroad line is exempt from the provisions of 49 U.S.C. 10903-10905 if the criteria designated in this section are satisfied.

(b) An abandonment is exempt if the carrier certifies that no local traffic has moved over the line for at least 2 years and any overhead traffic on the line can be rerouted over other lines, and that no formal complaint filed by a user of rail service on the line regarding cessation of service over the line either is pending with the Commission or has been decided in favor of the complainant within the 2-year period. The complaint must allege (if pending) or prove (if decided) that the carrier has imposed an illegal embargo or other unlawful impediment to service.

(c) The Commission has found that its prior review and approval of these abandonments (1) is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a; and (2) is of limited scope and unnecessary to protect shippers from abuse of market power. 49 U.S.C. 10505. A notice must be filed to use this class exemption. The procedures are set out in section 1152.50(d). This class exemption does not relieve a carrier of its statutory obligation to protect the interests of employees. 49 U.S.C. 10505(g)(2) and 10903(b)(2). This also does not preclude a carrier from seeking an exemption of a specific abandonment.

(d) Notice of exemption.

(1) At least 10 days prior to filing a notice of exemption with the Commission, the railroad seeking the exemption must notify in writing the Public Service Commission (or equivalent agency) in the State(s) where the line will be abandoned. The notice shall name the railroad, describe the line to be abandoned, indicate the exemption procedure is being used, and include the approximate date that the notice of exemption will be filed with the Commission.

(2) The railroad must file a verified notice using its appropriate abandonment docket number and subnumber with the Commission at least 50 days before the abandonment is to be consummated which includes the proposed consummation date, the certification required in section 1152.50(b), the information required in section 1152.32(a)(1-4), (8) and (e)(5), the level of labor protection, and a certificate that the notice requirements of section 1152.50(d)(1) have been complied with.

(3) The Commission through the Director of the Office of Proceedings, shall publish a notice in the *Federal Register* within 20 days after the filing of the notice of exemption. Petitions to say the effective date of the exemption must be filed within 10 days after publication and petitions for reconsideration must be filed within 20 days after publication. The exemption will be effective 30 days after publication (unless stayed pending reconsideration). If the notice of exemption contains false or misleading information, the use of the exemption is void *ab initio* and the Commission shall summarily reject the exemption notice.

APPENDIX A

Parties filing comments

Agnes Alzheimer
Association of American Railroads
B.C. Tree Fruits Limited
Boston and Maine Corporation, Debtor (Robert W. Meserve and Benjamin H. Lacy, Trustees)
California Department of Transportation
California Public Utilities Commission
Department of Defense
Department of Transportation
Electric Fuels Corporation
Interstate Commerce Commission Section of Energy and Environment
Family Lines Rail System
Donna M. Fornfeist
Georgia Department of Transportation
Georgia Public Service Commission
Great Falls Area Chamber of Commerce
Growmark, Inc.
Idaho Department of Transportation
Illinois Commerce Commission
Kansas Corporation Commission
Kansas Department of Transportation
Maryland State Railroad Administration
Minnesota Department of Transportation
Montana Department of Commerce and the Montana Wheat Research and Marketing Committee
Montana Farm Bureau Federation
Montana Citizen Freight Rate Association
Montana Grain Growers Association
Montana Public Service Commission
New Hampshire Public Utilities Commission
North Carolina Utilities Commission
New Jersey Department of Transportation
Norfolk and Western Railway Company
New York Department of Transportation
Ohio Rail Transportation Authority
Public Utilities Commissioner of Oregon
Railway Labor Executives' Association
Railroad Task Force for the Northeast
Patrick W. Simmons, Illinois Legislative Director for United Transportation Union
Union Equity Co-Operative Exchange
Utah Department of Transportation
Virginia Department of Highways and Transportation
Washington Department of Transportation
West Virginia Public Service Commission
Western Pacific Railroad Company
Women Involved In Farm Economics

(4) To address environmental issues and whether the right-of-way is suitable for other public purposes under 49 U.S.C. 10906, a party shall submit evidence to the Commission within 20 days of publication in the Federal Register. A notice to the parties will be issued if use of the exemption is conditioned upon environmental or public use conditions.

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APPENDIX F

Ex Parte No. 274 (Sub-No. 8A)

EXEMPTION OF OUT OF SERVICE LINES (DISCONTINUANCE OF SERVICE AND TRACKAGE RIGHTS)

Decided April 16, 1984

The Commission is exempting discontinuances of service and trackage rights under 49 U.S.C. 10903-10905 from the requirements of prior approval where the lines have been out of service for at least 2 years, subject to certain conditions and standard labor protection provisions.

DECISION

BY THE COMMISSION:

This proceeding was instituted on the Commission's own motion by a notice of proposed exemption and rulemaking (NPE) served June 16, 1983, and published in the Federal Register on June 16, 1983, at 48 F.R. 27584-88. This proposal would expand the exemption granted in *Exemption of Out of Service Rail Lines*, 366 I.C.C. 885 (1983) (*Out of Service*), and exempt from regulation under 49 U.S.C. 10505 the discontinuance of service and trackage rights over rail lines which have been out of service for at least 2 years.

We have received comments from the Association of American Railroads (AAR); the Department of Transportation of the State of New York (NYDOT); the Public Utilities Commission of the State of Ohio (PUCO); the Ohio Department of Transportation; and jointly the State of Illinois, the Illinois Commerce Commission, and Patrick W. Simmons, the Illinois Legislative Director for United Transportation Union (Illinois).

The AAR and PUCO support the proposal. The other parties filing comments oppose the proposal in whole or in part, but have raised no significant issues not discussed and disposed of in *Out of Service*, *supra*. Most of the arguments concern the potential for abuses which they claim would occur under this class exemption. However, the potential for abuse has been equally possible under the individual exemption procedure, although to date none have been brought to the Commission's attention. Further, in a discontinuance proceeding only the operations cease; the physical plant remains in place. Therefore, it is relatively easy

to correct an abuse of this exemption by requiring a resumption of service. Indeed, it was the frequent use of individual exemptions to permit abandonment of out of service lines, combined with the lack of public interest in those lines, which led to adoption of both of these rules. Reconsideration and revocation are available remedies in the unusual situation where this limited exemption is not consistent with the rail transportation policy.

Illinois argues that the NPE is defective because it did not set forth the precise language of the proposed exemption. An agency's notice to the public is adequate if the substance of the proposed agency action is presented. *National Indus. Traffic League* v. *United States*, 396 F. Supp. 456 (D.C. 1975). There is no requirement that the entire text of the proposed exemption be set out in the NPE. The proposed criteria for exemption were set out in the NPE, the substance of the exemption proposal was presented, and, therefore, the notice was adequate.

NYDOT again raises the argument that this exemption should leave intact the financial assistance provisions of 49 U.S.C. 10905. That provision is inapplicable, by its own terms, to abandonments or discontinuances permitted through exemption. See *Out of Service*, 366 I.C.C. at p. 888. Also, the Feeder Line Development Program, the purchase provisions of section 10910(b)(1)(A)(i), and private initiatives provide an adequate basis for interested persons to acquire out of service lines. Lastly, if for 2 years no one has requested service over a line, it would appear that special procedures for purchase to preserve rail service are not warranted. Therefore, no need has been shown for special procedures here.

AAR seeks clarification of three matters. First, AAR is correct that the meaning of "out of service line" for the purpose of this exemption is the same as the meaning set forth in *Out of Service*, *supra*. Second, this class exemption is available only to the railroad which performs the service. If discontinuance is sought by a party other than the operating railroad, either a formal application or an individual exemption must be filed. Third, this exemption applies to discontinuance of operations under a lease agreement. Discontinuance encompasses the cessation of service over a railroad's own line as well as a line it may lease from another carrier. This is also similar to a discontinuance of trackage rights.

An analysis of the comments filed confirms our preliminary conclusion that prior approval of the discontinuance of service and trackage rights over rail lines which have been out of service for at least 2 years is not necessary to carry out the goals of the rail transportation policy set forth at 49 U.S.C. 10101a. Exemption will minimize the need for regulatory control and require expeditious decisions when regulation is

required. It will also reduce regulatory barriers to exit from the industry, and encourage and promote energy conservation.

This exemption is of limited scope. Discontinuance of service or trackage rights over lines which have been out of service for at least 2 years would have little or no competitive or operational impact, because it will usually pertain to short-line segments with no shippers. Further, regulation is not needed to protect shippers from the abuse of market power because the lines would not have been used by shippers for at least 2 years.

In conclusion, the parties have raised no arguments which would require a change in our findings supporting this exemption and we will adopt the NPE without change. The amended rules are in the appendix.

For purposes of clarity, the first sentence of 49 CFR 1152.50(c) has also been rephrased slightly.

This action is taken under the authority of 49 U.S.C. 10321 and 10505, and 5 U.S.C. 553.

The Secretary of the Commission (See 49 CFR 1011.7(h)) has certified that this action will not have a significant economic impact on a substantial number of small entities. If no service has been performed over a line for at least 2 years, small entities that could conceivably be served either were not dependent on that service or have made other arrangements for service.

This action will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The Commission exempts from the requirements of 49 U.S.C. 10903-10905 the discontinuance of service and trackage rights over rail lines that have been out of service for at least 2 years.

2. Part 1152 of Title 49 of the Code of Federal Regulations is amended in conformance with the appendix to this decision.

3. This decision is effective on May 23, 1984.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett and Gradison. Commissioner Gradison did not participate.

APPENDIX

Revisions to the Code of Federal Regulations

TITLE 49 PART 1152

PART 1152—[AMENDED]

49 CFR Part 1152 Subpart F is ameded by revising the subpart heading and the heading and text of §1152.50 to read as follows:

Subpart F—Exempt abandonments and discontinuances of service and trackage rights

§1152.50 *Exempt abandonments and discontinuances of service and trackage rights.*

(a) A proposed abandonment or discontinuance of service or trackage rights over a railroad line is exempt from the provisions of 49 U.S.C. 10903-10905 if the criteria designated in this section are satisfied.

(b) An abandonment or discontinuance of service or trackage rights is exempt if the carrier certifies that no local traffic has moved over the line for at least 2 years and any overhead traffic on the line can be rerouted over other lines and that no formal complaint filed by a user of rail service on the line (or a State or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or has been decided in favor of the complainant within the 2-year period. The complaint must allege (if pending) or prove (if decided) that the carrier has imposed an illegal embargo or other unlawful impediment to service

(c) The Commission has found (1) that its prior review and approval of these abandonments and discontinuances is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a; and (2) that these transactions are of limited scope and continued regulation is unnecessary to protect shippers from abuse of market power. 49 U.S.C. 10505. A notice must be filed to use this class exemption. The procedures are set out in section 1152.50(d). This class exemption does not relieve a carrier of its statutory obligation to protect the interests of employees. 49 U.S.C. 10505(g)(2) and 10903(b)(2). This also does not preclude a carrier from seeking an exemption of a specific abandonment or discontinuance that does not fall within this class.

(d) Notice of exemption.

(1) At least 10 days prior to filing a notice of exemption with the Commission, the railroad seeking the exemption must notify in writing the Public Service Commission (or equivalent agency) in the State(s) where the line will be abandoned or the service or trackage rights discontinued. The notice shall name the railroad, describe the line involved, indicate the exemption procedure is being used, and include the approximate date that the notice of exemption will be filed with the Commission.

(2) The railroad must file a verified notice using its appropriate abandonment docket number and subnumber (followed by the letter "X") with the Commission at least 50 days before the abandonment or discontinuance is to be consummated. The notice shall include the proposed consummation date, the certification required in section 1152.50(b), the information required in section 1152.22(a)(1-4) and (8), and (e)(5), the level of labor protection, and a certificate that the notice requirements of section 1152.50(d)(1) have been complied with.

(3) The Commission, through the Director of the Office of Proceedings, shall publish a notice in the Federal Register within 20 days after the filing of the notice of exemption. Pe-

titions to stay the effective date of the exemption must be filed within 10 days after publication and petitions for reconsideration must be filed within 20 days after publication. The exemption will be effective 30 days after publication (unless stayed pending reconsideration). If the notice of exemption contains false or misleading information, the use of the exemption is void *ab initio* and the Commission shall summarily reject the exemption notice.

(4) To address environmental issues and whether the right-of-way is suitable for other public purposes under 49 U.S.C. 10906, a party shall submit evidence to the Commission within 20 days of publication in the Federal Register. A notice to the parties will be issued if use of the exemption is conditioned upon environmental or public use conditions.

1 I.C.C. 2d

APPENDIX G

EX PARTE NO. 274 (SUB-NO. 8)[1]

EXEMPTION OF OUT OF SERVICE RAIL LINE

Decided November 3, 1986

On reopening, the Commission reaffirms its decisions to exempt rail line abandonments and service and trackage rights discontinuances from the requirement of prior approval under 49 U.S.C. 10903-05 where no traffic has originated or terminated on the line for at least 2 years, subject to certain conditions, including standard labor protective conditions.

DECISION

BY THE COMMISSION:

BACKGROUND

These proceedings are before us on remand from the United States Court of Appeals for the District of Columbia Circuit. In Ex Parte No. 274 (Sub-No. 8), the court vacated our prior decision exempting from regulation under 49 U.S.C. 10903-05 the abandonment of rail lines that have not generated any traffic (originating or terminating on the line) for at least 2 years.[2] In Ex Parte No. 274 (Sub-No. 8A), the court remanded, without discussion, our related decision broadening the exemption to cover service and trackage rights discontinaunces under the same sections of the Interstate Commerce Act (Act).[3] We are reopening these cases for further proceedings consistent with the court's opinion. Accordingly, our discussion covers the exemption as broadened to include trackage rights and service discontinuances.

[1]The instant decision embraces Ex Parte No. 274 (Sub-No. 8A), *Exemption of Out of Service Rail Lines (Discontinuance of Service and Trackage Rights)*.

[2]*Illinois Commerce Commission, et al.* v. *ICC*, 787 F. 2d 616 (D.C. Cir. 1986) (*Illinois* v. *ICC*).

[3]*Illinois Commerce Commission, et al.* v. *ICC*, No. 84-1164 (D.C. Cir. May 20, 1986). The exemption in *Exemption of Out of Service Rail Lines*, 1 I.C.C. 2d 55 (1984), involves only voluntary relinquishment by the party enjoying trackage rights, not eviction of a trackage rights tenant.

Under section 10903, rail lines may be abandoned and service and trackage rights may be discontinued only if the Commission finds that the present or future public convenience and necessity require or permit the action. In making this determination we balance the needs of shippers and communities for rail service against the burden that the line imposes on the carrier and interstate commerce.[4] Section 10904 sets forth the procedures for filing and processing abandonment and discontinuance applications. Section 10905 provides for the continuation of rail service over lines approved for abandonment or discontinuance through subsidy by or sale to a financially responsible person.

The exemption statute, 49 U.S.C. 10505, directs the Commission to exempt transactions from regulation when we find that: (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a; and (2) either (a) the transaction is of limited scope, or (b) regulation is not needed to protect shippers from the abuse of market power. We will now reexamine the proposed exemptions, in the manner called for by the reviewing court, to determine whether they meet the criteria of section 10505.

DISCUSSION AND CONCLUSIONS

Rail Transportation Policy

Under section 10505(a), we first determine whether regulation is needed to carry out the rail transportation policy. This requires the Commission to determine whether, on balance, those sometimes conflicting policies would be promoted or hindered by exemption from regulatory requirements that otherwise would apply. See *Baggett Transportation Co. v. United States*, 666 F. 2d 524, 530–531 (11th Cir. 1982).

The court required further examination and/or explanation of several rail transportation policy factors. We will address each of them here.

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[4] *Colorado v. United States*, 271 U.S. 253, 268 (1926).

1. *Energy conservation.*--The court found no support for our previous finding that exemption would promote energy conservation [section 10101a(15)].[5] Indeed, upon further reflection, we believe that energy conservation is unlikely to be affected in any significant way. Where a line has carried no traffic, local or overhead, there can be no impact from abandonment or discontinuance because no traffic will be cut off or diverted to other routes or other modes of transportation. Where there has been overhead traffic that will be rerouted, there may be a minimal increase or a decrease in fuel consumption. However, we predict that any increase in fuel consumption from rerouting traffic would be insignificant because it would be in the carrier's self interest to retain its most efficient routes and to aggregate traffic wherever possible to limit energy consumption. Thus, the exemption will have little or no practical impact on which lines ultimately are discontinued or abandoned; it will only reduce the cost and time involved in obtaining regulatory authority. In sum, exemption would have no significant impact on energy conservation policy.

2. *Rate reasonableness.*--The court also found that we failed to consider adequately whether abandonment or discontinuance of the lines and services covered by the exemption would expose shippers to excessive rates where there is an absence of competition.[6] *Illinois* v. *ICC*, 787 F. 2d at 630. We have reexamined the exemption in light of the concerns raised by the court, the comments of the parties, and our experience while the exemption was in effect. We conclude that exemption will not affect our ability to assure that carriers maintain reasonable rates and will not subject shippers to abuses of market power.

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[5] *Illinois* v. *ICC*, 787 F.2d at 629.

[6] Several factors enumerated in the rail transportation policy relate, either directly or indirectly, to the Commission's mission to protect shippers from unreasonably high rates. Chief among these is section 10101a(6), which directs us "to maintain reasonable rates where there is an absence of effective competition * * *." Section 10101a(4) directs us to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes. Finally, section 10101a(13) directs us "to avoid undue concentrations of market power."

The abandonment of, or discontinuance of service over, a rail line does not affect our ability to regulate the rates charged to remaining shippers. Carriers are required to file and maintain tariffs for rates on their remaining lines. Those tariffs are subject to protest (for changed rates) and complaint (for existing rates) procedures. If a carrier has market dominance, then the rate is subject to challenge on the ground that it exceeds a maximum reasonable level (49 U.S.C. 10709). If, on the other hand, there is effective competition, that competition will assure that reasonable rates are offered. The abandonments and discontinuances authorized by the exemption will in no way affect this scheme of regulation.

Various parties have argued there could be adverse rate impacts from abandonment or discontinuance of these lines and services because the lines would no longer be available for constructing more favorable rates.[7] However, carriers can freely raise and lower their rates as required by cost and competitive considerations, subject to the regulatory restraints described above, whether or not these lines and services are subject to abandonment application or these exemption procedures.[8] Carriers are not required to maintain a certain advantageous rate absent abandonment or discontinuance; they can freely terminate the use of a particular rate base at any time, even without abandonment or discontinuance via application or exemption, merely by filing a revised tariff that otherwise complies with the Act. Conversely, carriers can preserve a rate advantage for shippers, even if they abandon or discontinue the route on which the rate was originally based, again simply by filing a tariff to that effect.

In sum, exemption would not undermine the policies of section 10101a involving carrier rates. This exemption does not remove statutory rate protection for shippers, nor does it allow carriers to make rate changes that would not otherwise be permitted.

3. *Overhead traffic.*—The court was particularly concerned that our prior decision failed to analyze separately the effect of exemption on shippers of overhead traffic (i.e., traffic that neither originates nor

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[7]Carriers sometimes engage in the permissible fiction of allowing shippers to use a lower rate that applies over a route other than the actual route of movement.

[8]49 U.S.C. 10701a states that "unless a rate is prohibited by a provision of this title, a rail carrier * * * may establish any rate for transportation or other service provided by the carrier."

terminates on the line and can be rerouted over other lines).[9] However, the impact of abandonment on shippers of overhead traffic has never been a focus of our abandonment analysis under the Act in individual exemptions or in formal applications.[10] Rather, considering the potential adverse impacts of abandonment proposals, the Commission has traditionally focused on the harm to the shippers and communities located on the line, or who are otherwise dependent on the line for their service. This principle was recently affirmed in *People of State of Illinois* v. *ICC*, 698 F. 2d 868, at 873 (7th Cir. 1983), quoting *Baltimore & Ohio R. Co. Abandonment*, 354 I.C.C. at 244:

> local shippers who are unable to support a railroad cannot demand continued rail transportation simply because the branch is used for movement of through traffic which could be handled as expeditiously over other routes. (Citation omitted.) This policy reflects the well-established principle that the routing of overhead traffic and the selection of alternative routes for the handling of such traffic is a matter of managerial discretion. (Citation omitted.)

Indeed, neither the Commission nor any court (to our knowledge) has ever required a carrier to forego the abandonment of a line which generates no traffic simply to protect the interests of shippers moving overhead traffic that can be rerouted over another of the carrier's lines. In fact, the rerouting of overhead traffic is a matter of managerial discretion that requires no regulatory authorization and can be accomplished even where abandonment authority is denied. Thus, the routing of overhead traffic is not an issue that would affect the outcome of an abandonment proceeding.

Moreover, our initial assessment that overhead traffic would not be a principal concern in these cases is confirmed by the fact that, in over two hundred abandonment proceedings processed under this exemption while it was in effect, public comments were filed in only about 10, and none was from a shipper of overhead traffic. Nor has

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[9] *Illinois* v. *ICC*, 787 F. 2d at 635.

[10] *Southern Pac. Co. Abandonment*, 317 I.C.C. 489, 493 (1962); *Baltimore & Ohio R. Co. Abandonment*, 354 I.C.C. 240 (1978); *Chicago, M., St. P. & P.R. Co. Trustees Abandonment*, 240 I.C.C. 751, 767 (1940); *Missouri Pac. Abandonment Bet. Bismarck and Whitewater*, 342 I.C.C. 643 (1972); and *Southern Pacific Transp.Co.--Abandonment*, 360 I.C.C. 138, 140 (1979).

any shipper appeared in this proceeding to complain that it would be subjected to higher rates or other hardship as a consequence of the rerouting of overhead traffic.

In any event, to use this exemption, a carrier must certify that the overhead traffic on the line, if any, can be rerouted efficiently. A shipper is free, if it so chooses, to file a petition for reconsideration contesting a carrier's representations with regard to this issue.

For all of these reasons, we conclude that the standards and procedures of sections 10903–05 are not necessary to protect the interests of overhead shippers using lines that could be abandoned under the abbreviated exemption procedures.

4. *National defense.*—The rail transportation policy also calls for "the development of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense" [section 10101a(4)]. The court found that our prior decision did not give adequate attention to the comments of the United States Department of Defense (DOD) on this matter.[11]

DOD argued that advance notice is essential for it to estimate the potential impacts of abandonments and discontinuances and take steps to retain needed rail service. DOD noted that facilities that have not used rail service for 2 or more years might nevertheless require rail capability in a prolonged wartime effort. DOD suggested that the railroads continue to be required to identify these lines on their system diagram maps at least 4 months prior to using the exemption, and that requests to use the financial assistance procedures of section 10905 be granted through partial revocation of the exemption where necessary.

In *Exemption of Out of Service Rail Lines—Notice To The Department of Defense*, 1 I.C.C. 2d 323 (1985), we answered DOD's concern by requiring railroads using the class exemption to notify DOD in writing at least 10 days prior to the filing of a notice of exemption. (This is the same advance notice provided State public service commissions. See 49 CFR 1152.50(d), as amended.) While this is slightly less advance notice than DOD originally requested, it should afford DOD ample time to identify lines that should be preserved to protect the national defense interest. DOD may then file timely petitions for partial revocation and ask for reinstituion of the section 10905 procedures for those particular lines. The Commisison would

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[11] *Illinois* v. *ICC*, 787 F. 2d at 630.

grand such petitions if DOD needed to acquire a subsidize a line in connection with the national defense.

Indeed, we believe that the financial assistance provisions should be available when anyone is interested in acquiring a line that would otherwise be abandoned or discontinued in order to provide continued rail service. Therefore, we will institute shortly a rulemaking proceeding, in Ex Parte No. 274 (Sub-No.16), *Exemption of Rail Line Abandonments-Offers of Financial Assistance*, to consider how we can best adapt the financial assistance procedures of section 10905 to the timeframes and procedures for abandonments and discontinuances that have been exempted from the certification requirements presupposed in section 10905. Section 10905 would apply whether a discontinuance or abandonment is exempt under the class exemption or has been exempted individually in a particular case. In sum, the proposed rulemaking would end the existing distinction between regulated and exempt abandonments and discontinuances, and eliminate the need to file petitions for revocation to invoke section 10905, even with regard to exempt abandonments and discontinuances. In the interim, we will partially revoke exemptions where financially responsible persons, including DOD, file timely petitions seeking to submit offers of financial assistance and use the procedures of section 10905.

These procedures, taken together, should satisfy all of the concerns that DOD has expressed, and the class exemption should thus have no adverse impact on the national defense. Moreover, the exemption will benefit carriers by expediting liquidation of excess land, track, and materials. By promptly liquidating burdensome properties, carriers will enhance their financial position, be more efficient, and thus be able to compete more aggressively. Accordingly, facilitating abandonment of, and discontinuance of service over, these rail lines should promote the development and continuation of a sound rail transportation system with effective competition to meet the needs of the public and the national defense.

5. *Cooperation with the States.*—The court found that, because many States objected to the lack of notice of proposed abandonments and the unavailability of the offer of financial assistance procedures under the exemption, we should have considered whether exemption was consistent with the policy objective of cooperation "with the States in transportation matters to assure that intrastate regulatory jurisdiction

is exercised in accordance with the standards established in this subtitle" [section 10101a(9)].[12]

Regarding notice, States recommended that system diagram map requirements be retained[13] or that a new "out of service" category be established[14]: (1) to assist the States' rail planning efforts; (2) to allow States to examine why a line is not used and whether any shipper reasonably relies on it; and (3) to give notice to rail users who oppose the application. States commented that the financial assistance procedures under section 10905 are needed (in addition to private negotiation and the Feeder Line Development Program procedures[15]) to compel the sale of rail lines for continuation of service that would otherwise be lost, and to prevent rights-of-way held under easements conditioned upon rail use from reverting before new service can be instituted.

We find that retention of the system diagram map and other formal notice requirements is not necessary to carry out the goal of cooperating with the States on transportation matters. System diagram map notice is not essential to State rail planning in this instance. States generally use rail plans as a blueprint of the present and future rail services needed to support industrial and agricultural interests critical to the State's economy. Lines generating no traffic are unlikely to contribute to a State's business economy, but, if such a line is considered crucial, a State should monitor its activity because nonuse

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[12]The court found that "any sort of cooperation with the States on transportation matters is calculated to increase the probability that the States will reciprocate by continuing to observe Federal standards." We would note that under the State certification process of 49 U.S.C. 11501 [particularly subsection (b)(1)]. State consistency with Federal standards is mandatory, rather than discretionary. *State of Texas* v. *United States*, 730 F. 2d 339, 353 (5th Cir. 1984), cert. denied, 105 S. Ct. 267 (1984).

[13]49 U.S.C. 10904(e) requires railroads to maintain complete diagrams of their transportation systems, including descriptions of all lines potentially subject to abandonment. If an application is protested by a shipper or by a State where the line is located, a certificate may be issued only if the line has been identified in the diagram at least 4 months before the abandonment application is filed.

[14] It was recommended that railroads be required to identify all lines that are "out of service" for 1 year, or identify lines as ones "intended for abandonment" for 1 year before they could be abandoned under the exemption.

[15]49 U.S.C. 10910 and 49 CFR Part 1151.

usually heralds eventual abandonment or discontinuance. It is reasonable for a shipper to rely on the continuation of a service only if the shipper makes regular use of it; a 2-year gap in rail use is not "regular" use.

Further, a new business should inquire with the railroad about rail service opportunities before locating on one of its lines, especially if the shipper needs rail service to succeed. Railroads intending to abandon or discontinue would have every reason to be forthright about their plans if a new shipper inquired about rail service prospects. We would look with extreme disfavor on any exemption request or notice following a misleading action (or failure to act) by a railroad that induced a new shipper to locate on a line that the railroad would not continue to serve.

In our prior decisions, we changed the procedures originally proposed to provide for notice and an opportunity to be heard before abandonment or discontinuance could be consummated.[16] Specifically, our rules require: (1) notice to the State Public Service Commission (or equivalent agency[17]) 10 days prior to filing a notice with the Commission; (2) publication of the notice of exemption in the Federal Register within 20 days of filing with the Commission; and (3) filing of any stay requests within 10 days after publication. Exemption will not be effective for an individual line until 30 days after publication.

Thus, States (and DOD) have up to 30 days' notice of an exemption proposal before it is published, 10 more days to file a stay petition, and another 10 days to petition for reconsideration. Exemption is effective and abandonment or discontinuance can occur, at the earliest, 60 days after a State (or DOD) first receives notice. Additional notice is not needed to give interested parties an opportunity to protest the discontinuance or abandonment where, as here, there are no shippers who lose service. The benefits of system diagram map notice would be minimal and would not outweigh the burden on railroads of maintaining the maps and delaying abandonment or discontinuance for 4 months after the line first appears on the map. 49 U.S.C. 10904(e)(3).

[16]Under the rules originally proposed, carriers would have been able to abandon a line or discontinue service or trackage rights before notice was published in the Federal Register.

[17]And, as discussed above, to DOD.

Because the class exemption is intended to provide a simple, expedited procedure for railroads to discontinue service or abandon and remove track and materials from lines that are not needed, and because the transactions would, in most instances, be noncontroversial, the degree of notice provided in these rules is adequate to meet the needs and concerns of the States, as they have been expressed in this proceeding.

In response to the States' requests to maintain the financial assistance procedures, we shortly will be instituting the rulemaking proceeding mentioned above [Ex Parte No. 274 (Sub-No. 16)], to make the section 10905 procedures automatically available in class and individual exemption proceedings. Until that rulemaking is completed, States and other interested parties should file timely petitions for partial revocation of exemptions where they wish to implement section 10905. We will grant such petitions as necessary to invoke those procedures.[18]

Limited Scope and Protection from Abuse of Market Power

As first proposed, the exemption was for lines carrying no traffic at all for at least 2 years and would thus clearly have no operational impact. In adopting the broader exemption (extending to lines carrying overhead traffic), we offered the same rationale (no operational impact) for finding that the exemption was of limited scope and that regulation was not needed to protect shippers from market power abuses. The court found that we should have reexamined the basic rationale for the exemption when we expanded it to embrace lines carrying overhead traffic. The court surmised that the number of overhead shippers affected by a particular exemption could be vast, and that they might be susceptible to competitive and operational impacts and even market power abuses.[19]

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[18] In our prior decision, we indicated that the procedures of section 10905 could not be available in an exemption proceeding because section 10905 is triggered by the publication of a certificate (which would not be issued in exemption cases). Upon further consideration, we reject that analysis because it elevates form over substance. To carry out transportation policy, the Commission can relieve carriers from certain regulatory requirements while leaving them subject to others, as we will be proposing to do in Ex Parte No. 274 (Sub-No. 16).

[19] *Illinois* v. *ICC*, 787 F. 2d at p. 635.

As explained above (at pages149–150), in regulating abandonments, the Commission has always focused on the harm to shippers and communities located on the line, not to shippers of overhead traffic. Because overhead traffic would not affect the ultimate decision whether to permit an abandonment even in formal application proceedings, the exemption has very limited impact, if any at all, on overhead traffic. Moreover, we cannot recall even one instance where shippers of overhead traffic demonstrated an interest, either in formal cases or exemption proceedings. Therefore, the scope of this exemption, viewed in terms of its potential impact, remains limited.

The abandonment of, or discontinuance of service over, these lines will have no impact on a carrier's market power. A carrier does not compete with itself, one routing option vying with another for the greatest share of traffic. If a carrier has no market power before discontinuance or abandonment, reducing the routing options over its own lines (to exclude a route that it believes is not convenient or efficient) can not create that power. The carrier will still be subject to the same competitive pressures, from other carriers or other modes, as it was before discontinuance or abandonment. Conversely, if a carrier already has market power, reducing its internal routing options will neither increase nor diminish that power.

It has been suggested by Patrick W. Simmons and the Illinois Commerce Commission that the discontinuance of trackage rights can affect competitive relationships within the rail industry. It is true that trackage rights are one method of making the services of an additional rail carrier available in a market. But use of this exemption is available only to the carrier holding the trackage rights, and not to the owning road. No carrier can be forced under the exemption to surrender its right to use tracks. Moreover, no rail carrier would voluntarily relinquish its right to operate over certain tracks if doing so would impair its service or hinder its ability to compete. Thus, regulation is not necessary in this regard because carriers will follow their own self interest.

Labor Protection

Finally, the court is concerned that we have not provided adequate guidance for parties seeking labor protection conditions in addition to the standard conditions set forth in *Oregon Short Line R. Co.—Abandonment–Goshen*, 360 I.C.C. 91 (1979) (*OSL*).

Formal application cases where labor interests have demonstrated that labor protection beyond the *OSL* protections would be appropriate are extremely rare. Under the *OSL* conditions, employees who lose their jobs because of an abandonment or discontinuance may be entitled to have their full pay continued by the railroad for as long as 6 years. Thus, even though the *OSL* conditions are the minimum required by law, they are not insubstantial and have not been shown to be inadequate. Moreover, the procedure adopted here is the same as that used in formal applications, *i.e.*, a case for added protection must be made.

Indeed, where lines have not been used to originate or terminate traffic for 2 years, the impact of discontinuance or abandonment should tend to be less severe than where substantial traffic has been moving because employees already will have been shifted to other locations. Thus, the *OSL* conditions should be adequate. However, they can be augmented in exemption proceedings, as in other cases, where circumstances warrant.

The appropriate procedure by which labor may request higher levels of protection is through a petition for partial revocation. Revocation is available at any time under 49 U.S.C. 10505(d) and will not delay the discontinuance or abandonment process. This procedure will adequately protect labor, whose interests are fully susceptible to remedy after discontinuance or abandonment. We will amend our rules, as set forth in the appendix, to clarify that a petition for partial revocation is the proper way to seek labor protection in excess of *OSL*.

CONCLUSION

We conclude that full, formal regulation of abandonment and discontinuance proposals is not required to carry out the rail transportation policy of section 10101a. Rather, the class exemption we are readopting appears more suitable for the discontinuance of service over, and abandonment of, the lines involved here. This exemption will "minimize the need for Federal regulatory control" and allow "fair and expeditious regulatory decisions" [section 10101a(2)] by reducing the time and filing requirements associated with these cases. It will also "promote a safe and efficient rail transport system" [section 10101a(3)] by allowing carriers quickly to dismantle and reuse or liquidate underused rail assets. The class exemption will also "reduce regulatory barriers to * * * exit from the industry" [section

10101a(7)]. There should be no significant adverse impact on "cooperation with the States on transportation matters" [section 10101a(9)], due to the protections built into the exemption, including notice to States and the availability of financial assistance procedures. These protections also should alleviate the concerns expressed by the Department of Defense. Facilitating discontinuance and abandonment of these underused services and lines should, on balance, contribute to reinvestment in a "sound rail transportation system * * * to meet the needs of the public and the national defense" [section 10101a(4)]. The overall benefits of the exemption in promoting the rail transportation policy clearly outweigh any foreseeable detriment.

Other concerns raised by various parties relating to the rail transportation policy are unwarranted. The exemption will have no impact on ratemaking and no adverse impact on labor interests [sections 10101a(4), (6), (12), and (13)]. Labor will receive the same protection as accorded in formal abandonment and discontinuance cases and, as provided in our amended rules, an adequate means of requesting more protection, should that be justified by the circumstances. The exemption will have no significant impact on energy conservation [section 10101a(15)].

The exemption is limited in scope because it merely reduces the regulatory burdens attendant to a class of rail abandonments and discontinuances with no local shipper interest, and that would almost certainly be granted in any event. (Out of over two hundred cases filed under these procedures already, only 10 generated any response.)

Finally, as discussed more fully above, the exemption will not subject shippers to an abuse of market power.

This action is taken under the authority of 49 U.S.C. 10321, 10505, and 10903–05, and 5 U.S.C. 553.

The Commission certified, in the prior proceedings, that these actions would not have a significant economic impact on a substantial number of small entities. We reaffirm that finding.

This action will not significantly affect either the quality of the human environment or energy conservation.

VICE CHAIRMAN SIMMONS, dissenting:

Upon consideration of all of the issues and arguments raised in this proceeding, I do not believe the class exemption should be readopted. As I have stated numerous times in the past, I am deeply concerned that the Commission's actions foster the national defense and energy

conservation aspects of the National Transportation Policy. This can be best achieved in the abandonment area by considerating exemption petitions on a case-by-case basis, even where a line has been out of service for 2 years. I believe the additional burden on the railroads would be minimal, especially when weighed against the vital national security interests which would be afforded at least some increment of added protection.

COMMISSIONER LAMBOLEY, dissenting:

I believe there may be a basis for exemption of "out of service lines".

However, the instant decision fails, in my view, to appropriately fashion such an exemption.

Unfortunately, on remand, we did not open the proceedings for further comment nor do we, in my judgment, adequately address the issues raised by previous commentators and the reviewing court.

It is ordered:

1. These proceedings are reopened and we reaffirm our decisions in *Exemption of Out of Service Rail Lines*, 363 I.C.C. 885 (1983), and *Exemption of Out of Service Rail Lines*, 1 I.C.C. 2d 55 (1984), as modified by this decision, to exempt from regulation under 49 U.S.C. 10903-05, respectively, the abandonment of, and discontinuance of service and trackage rights over, rail lines on which no traffic has originated or terminated for at least 2 years and no user has complained to a district court or the Commission about service cessation, or obtained a favorable decision in any such case, within 2 years.

2. The rules at 49 CFR Part 1152 are readopted and amended as set forth in the appendix.

3. This decision is effective on December 22, 1986.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre, and Lamboley. Vice Chairman Simmons and Commissioner Lamboley dissented with separate expressions.

Noreta R. McGee
Secretary

(SEAL)

APPENDIX

Title 49 of the Code of Federal Regulations is amended as follows:

PART 1152--ABANDONMENT AND DISCONTINUANCE OF RAIL LINES AND RAIL TRANSPORTATION UNDER 49 U.S.C. 10903

(1) The authority citation for 49 CFR Part 1152 continues to read as follows:

Authority: 5 U.S.C. 553, 559, and 704; 16 U.S.C. 1247(d); 31 U.S.C. 9701; 45 U.S.C. 904 and 915; and 49 U.S.C. 10321, 10362, 10505, and 10903 *et seq.*

(2) Section 1152.50 is amended by adding a new pargaraph (d)(5) to read as follows:

§1152.50 *Exempt abandonments and discontinuances of service and trackage rights*

* * * * * * *

(d) * * *.

(5) To address whether the standard labor protective conditions set forth in *Oregon Short Line R. Co.--Abandonment--Goshen*, 360 I.C.C. 91 (1979), adequately protect affected employees, a petition for partial revocation of the exemption under 49 U.S.C. 10505(d) must be filed.

* * * * * * *

APPENDIX H

STATUTES

TITLE 49 U.S.C.

§ 10101a. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle:

(10) to encourage honest and efficient managment of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on indiviudal rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

§ 10505. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall ex-

empt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtittle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an intreseted party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of the title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

§ 10904. Filing and procedure for applications to abandon or discontinue

(a)(1) An application for a certificate of abandonment or discontinuance under section 10903 of this title, and a notice of intent to abandon or discontinue, must be filed with the Interstate Commerce Commission.

* * * * *

(e)(1) In this subsection, "potentially subject to abandonment" has the meaning given the term in regulations of the Commission. The regulations may include standards that vary by region of the United States and by railroad or group of railroads.

(2) Each rail carrier shall maintain a complete diagram of the transportation system operated, directly or indirectly, by the carrier. The carrier shall submit to the Commission and publish amendments to its diagram that are necessary to maintain the accuracy of the diagram. The diagram shall —

(A) include a detailed description of each of its railroad lines potentially subject to abandonment; and

(B) identify each railroad line for which the carrier plans to file an application for a certificate under subsection (a) of this section.

(3) If an application for a certificate is opposed by—

(A) a shipper or other person that has made significant use (as determined by the Commission) of the railroad line involved in the proposed abandonment or discontinuance during the 12-month period before the filing of the application for a certificate; or

(B) a State or political subdivision of a State in which any part of the railroad line is located;

the Commission may issue a certificate under section 10903 of this title only if the railroad line has been described and identified in the diagram or amendment to the diagram of the rail carrier that was submitted to the Commission at least 4 months before the date on which the application was filed, except that the requirement of such description or identification in such diagram may be waived by the Commission if the application was approved by the Secretary of Transportation as part of a plan or proposal under section 5(a)-(d) of the Department of Transportion Act (49 U.S.C. 1654(a)-(d)), or the application is filed by a railroad in bankruptcy.